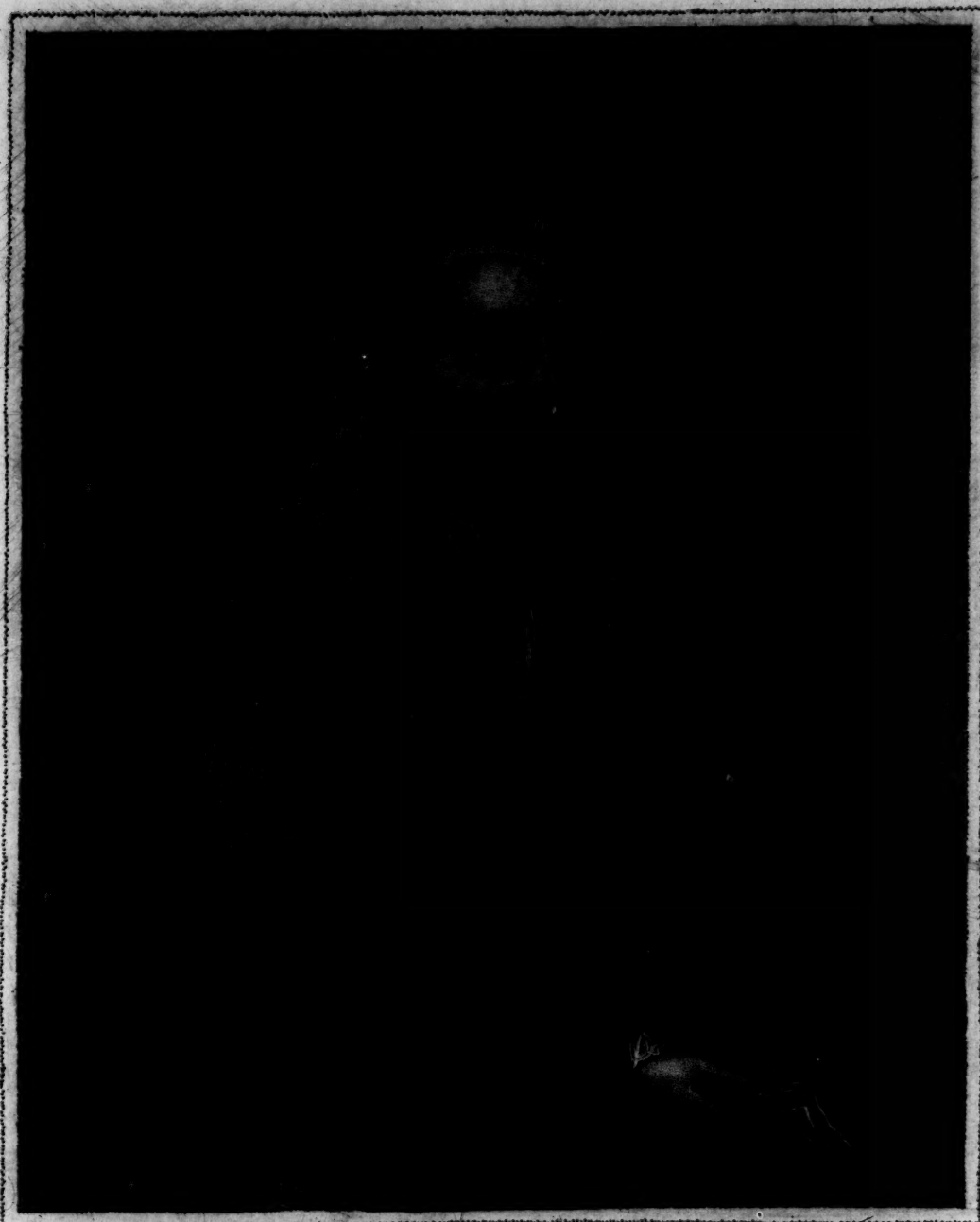




Slater pinxit, 1770.

C. Knight sculpsit, 1795.

THE HON.^{BLE} DAINES BARRINGTON.

Thomas Aston.

OBSERVATIONS
ON
THE MORE ANCIENT
STATUTES

6193: dd. 1.

FROM

MAGNA CHARTA

TO

THE TWENTY-FIRST OF JAMES I. CAP. XXVII

WITH

AN APPENDIX,

BEING

A PROPOSAL FOR NEW MODELLING THE STATUTES.

BY THE HONOURABLE DAINES BARRINGTON.

“Nam tametsi non integras contineant politiarum descriptiones, habent tamen memora-
“abilia quædam instituta, nec in vulgus nota, quæ quidem talia sunt, ut, qui ea
“rectè adhibere voluerit, sæpe in consiliis, in legibus, in judiciis commodare
“potuerit.” Nich. Cragius in Præf. ad Heraclidæ Pontici de politiis libellum. —

THE FIFTH EDITION.

LONDON,

PRINTED BY J. NICHOLS:

AND SOLD BY G. LEIGH AND J. SOTHEY, IN YORK-STREET;

B. AND J. WHITE, AT HORACE'S HEAD, IN FLEET-STREET;

AND J. NICHOLS, RED-LION PASSAGE, FLEET-STREET.

M D C C X C V I.



“ Alienæ gentis legibus, ad exercitium utilitatis imbui et permittimus, et optamus; ad negotiorum verò discussionem, et resultamus, et prohibemus.” Inter Leges Wisigothorum. Lindenbrog.

“ Bien sofremos, e queremos que todo ome sepa otras leges, por ser mas entendidos los omes, e mas sabidores; mas no queremos, que ninguno por ellas rzone, ni jusque, mas todos los pleytos sean juzgados, por las leys deste libro que nos damos a nuestro pueblo, que mandamos guardar.” Inter leges Alphonfi Sapientis, Fuero Real de Espanna, lib. i. titl. 6. Salamanca, 1569.

“ Il est tems de chercher à present dans l'importante affaire du gouvernement, et des loix, de nouveaux traits, qui nous peignent au naturel le peuple dont nous étudions l'histoire.” Hist. de Dannemarc, par Mallet, tom. i. p. 100. Copenhagen, 1755.

“ Qui ignore les loix et coustumes de son pais, est digne d'être réputé au nombre des estrangers.” Pref. aux Ordinances Royales. Paris, 1552.

P R E F A C E.

IT is believed that few lawyers, or historians, have perused the Statute-book in a regular course of reading: if a particular act of parliament hath been necessarily examined into, either by the one or the other, the research hath probably gone no further than to that particular statute, or, at most, to those only which relate to the same subject-matter. It must be admitted, that this would not be the best method of illustrating, or explaining any other author, in which light the successive parliaments must be considered; and it hath always been allowed, that the most satisfactory comment arises from the work itself, when the different parts of it have been properly compared.

I must own that I did not read the Statute-book with attention, from the motive I have above alluded to; my only object was to take notice of such acts of parliament, from which no good effects could be expected; and which, on the contrary, might contribute to the vexation of the subject, as well as to the unnecessary swelling the collection of statutes.

If it be asked what purpose this could answer, besides the satisfaction of my own private curiosity, I must admit, that I had a view of laying a proposal before the publick, with regard to the repealing such useless statutes, as well as reducing acts which related to the same subject, to one uniform and consistent law [a].

[a] See a proposal with regard to this in the Appendix.

This very thought or idea may, perhaps, by some be considered as highly presumptuous; but it would have been still more so, if I had not given to each statute a diligent and careful perusal.

At the same time that many such laws occurred in every reign, other observations naturally arose. It appeared that the old acts of parliament were, as far as they went, the very best materials for an English history; and that they were likewise strongly descriptive of the manners of the times[b]. It will be found, that the inhabitants of this country were, three or four centuries ago, guilty of many crimes, which we have at present scarcely an idea of; and that we are not indebted to them, at least in their capacity of legislators, so much as hath been generally supposed. At the same time we owe much to them, as there were greater struggles for a constitutional freedom, than in any other country of Europe during the same period. This, however, should not rest upon assertion merely, without having examined the materials proper for forming a comparative judgement: I have, therefore, looked into the *Ordinances* of most countries of Europe, during the thirteenth and three following centuries[c], to which time I mean to confine my observations; during which period it will appear, that our laws are much superior. I have particularly examined the Scotch acts of parliament, since the year 1424[d], which,

[b] “ Tout homme de bon entendement, sans voir une histoire accomplie, peut presque imaginer de quelle humeur fut un peuple, lorsqu’il lit ses anciens statuts, et ordonnances, et d’un même jugement peut tirer en conjecture, qu’elles furent ses loix voyant sa maniere de vivre.” *Recherches de Pasquier*, p. 349. Paris, 1633, folio.

[c] These *Ordinances* are likewise frequently expository of our Statutes, especially when they happen to have been made nearly at the same time.

[d] The collection of Statutes, published by Sir Thomas Murray of Glendook, clerk of the council in 1681, begins with the first year of James the First of Scotland. The first edition of them, however, was by Liprevick in 1566; and, from the black character in which they were printed,

which, though continued regularly from one reign to another, have been most unaccountably neglected by all our lawyers and historians. It is well known, that the introduction to their *Regiam Majestatem*, as well as many other parts of that ancient book of the Scotch law, are the same with our *Glanvil*; and though formerly there were great animosities between the two nations, yet, from their vicinity, there was to a certain degree, a communication of customs, as well as manners. The learned *Craig* supposes, that the English law is, in some particulars, the foundation of that of Scotland, and that the *Regiam Majestatem* is a mere transcript from our *Glanvil*; other writers upon the Scotch law, particularly *Bruce* [e], have denied this, asserting that the English is derived from the Scotch; but be this as it may, the very point in litigation necessarily supposes an agreement, and connexion.

As for the opinion of English writers upon this head, I have not happened to meet with one, who seems ever to have looked into the Scotch law any further than to have compared *Glanvil* and the *Regiam Majestatem* [f]; it is also very particular, that

printed, they were called *Acta Nigra*. Skene afterwards, who was clerk of the parliament, and hath written a Glossary to explain some of the antiquated words, continued the *Black Acts* to the year 1597: traces, however, are to be found of much earlier laws, in *Hector Boethius* and other historians.

[e] “Non prætereundum, virum clarissimum [sc. Cragium] (quòd in “epistolâ nuncupatoriâ, et sexcentis aliis in locis apertè professus est) dum “regnorum Scotiæ et Angliæ adunationi velificatur, eum in finem pro- “bare admittitur, maximam inter se affinitatem habere utriusque gentis “jura, in eâ præcipuè operam posuisse suam, ut ab Anglorum principum “placitis, istiusque gentis consuetudinibus, mores patrios haud minimâ ex “parte defluxisse demonstret. *Sed quid (malum!) nobis cum antiquis, in- “visisque hostibus.*” *Bruce’s Princip. Jur. Feud. Edinb. 1713, in scopo.*

[f] See Lord Bacon, vol. ii. Whitelock’s Comm. on the Parl. Writ, vol. ii. p. 272. Reliq. Spelm. p. 72. 4th Inst. cap. 75. And lastly, Hale’s Hist. C. Law, cap. 10.

even in *Calvin's* case [g], when the judges might have paid their court so well to James the First, by shewing an affinity between the two laws, there is not any allusion to such an agreement. This is the more extraordinary, as this king, in one of his speeches to the parliament, says, "all the law of Scotland for tenures, wards, liveries, and seignories, is drawn from England; and James the First of Scotland, being educated in England, brought the English laws in a written hand [b]."

With regard to the laws of the other parts of the world, I have chiefly confined my observations, in illustrating any of the statutes, to those of the more northern parts of Europe. If some of the inhabitants of this island are descended from the *Angles*, or *Saxons*, the ancient customs of these people must have been adopted by us: if others are of *Danish* extraction, the laws of *Denmark*, *Sweden*, and *Norway*, must likewise be supposed to bear a great affinity to ours.

The same observation holds equally with regard to the laws of Normandy, or other provinces of France; and if it is contended, that some of our customs are merely of *British* origin, the laws of *Hoel Dda* must be consulted, which are perhaps the most regular collection of ancient ordinances that are any where extant [i].

The following observations are, therefore, the result of a very attentive reading of whatever might most contribute to the more fully understanding the statutes; and, notwithstanding great diligence hath not been wanting in procuring these materials, as well

[g] 7 Cok. Rep. p. 1.

[b] King James's Works, p. 523.

[i] Perhaps *les Affises de Jerusalem* may be excepted; for an account of which, see the observations on the twenty-seventh of Henry the Eighth. The *Speculum Suevicum* is also a very considerable collection of the ancient laws of the North-Eastern parts of Germany.

as in the perusal of them, I yet fear that I must beg a more than common share of indulgence from the reader.

I can hardly flatter myself, that any one will give a regular perusal to what consists of such miscellaneous matter: I will only request that those who may look into what relates to any particular statute, would afterwards cast their eye upon the index, as, perhaps, it may furnish a reference to what may tend to illustrate the same point.

It may be proper likewise to mention, that, in some instances, the reading the law itself may be necessary for the more clearly understanding the *Observations*. If it be said that the statute should therefore have been printed at length, together with the comment, the answer is, that this would have greatly swelled the book; and as most of those, who will ever look into these remarks, will probably be of the profession of the law, it is needless to say, that every lawyer must have some edition of the statutes in his study. In order likewise to keep the work within due bounds, I have scarcely, in any instance, translated any citation or authority, and have, in some places, omitted what I thought to be least material in the former editions.

As some few of the *Observations* are verbal, it may not be improper to inform the reader, that the edition of the Statutes, which I have generally made use of, is that of Mr. *Cay*. I do not by this pretend to enter into the comparative merit of this and the latter editions; but am persuaded, from the great learning as well as accuracy of the editor, that it will not easily be rendered more perfect, except by the addition of the statutes of the present reign. I have likewise very frequent occasion to support what I have advanced, by citations from *Rymer's Fœdera*; it may not be improper, therefore, to observe, that the edition I have made use of, is that printed at the *Hague* in 1745. As for other authorities, when they are taken from books which are not easily

easily procured, I have generally mentioned the place, and time, when the work was printed, in a note subjoined to such authority. Having indeed omitted this in some few instances, I had thoughts of prefixing a list of the authors cited, which hath been not uncommonly practised: I have, however, been deterred from making such a catalogue, by its being condemned by many, as ostentatious.

I have in each of the preceding editions made considerable alterations, for which it is scarcely necessary to make excuses, because we live to little purpose, if we do not find occasion both to enlarge and correct our thoughts upon many points. If, therefore, a later edition of a book is in any manner improved, it can possibly affect only those readers who, having bought the work, wish afterwards to dispose of it. It must be admitted that such as have purchased a more early edition with this view, cannot sell the book again at so good a price; but for all other purposes their copy is equally valuable, as if an improved edition had not been published. I hope, however, that the number of those who are thus injured is not very considerable, and to such only I must apologize.

Having been informed that a new Edition of the OBSERVATIONS ON THE MORE ANCIENT STATUTES was wanted, I began to prepare for it, and should probably have made some Alterations and Additions, as in the previous ones, had I not been prevented by a severe fit of the Ague; from the effects of which I am not recovered, so as to enable me to do more than reprint the last Edition. I must take, however, this opportunity of thanking some Friends and Correspondents, for several most obliging and valuable suggestions, of which I otherwise should have availed myself.

September 17, 1795.

STATUTES

STATUTES OBSERVED UPON

STATUTES
OBSERVED UPON.

Magna Charta.	Page 1.
Chap. 1, IV, VII, XI, XIV, XXII, XXIII, XXV, XXIX, XXX, XXXIV, XXXVI, XXXVII.	
Charta Forestæ.	35
Chap. ix, x, xii, xiii, xvi.	
Statutum Hiberniæ, 14 Hen. III.	44
Provisiones de Merton, 20 Hen. III.	46
Chap. iv, v, ix.	
Affisa Panis & Cervisæ, 51 Hen. III.	52
Statutum de Scaccario, 51 Hen. III.	57
Statutum de Marlebridge, 52 Hen. III.	66
Chap. xi, xxvi, xxix.	
Westminster Primer, 3 Edw. I.	77
Chap. xi, xii, xxiv, xxxviii.	
Extenta Manerii, 4 Edw. I.	103
The Statute of Bigamy, 4 Edw. I.	106
Statutum Gloucestræ, 6 Edw. I.	107
To all Parliaments and Treaties every one shall come without force or arms, 7 Edw. I.	112
A new Statute of the Exchequer, called the Statute of Rutland, 10 Edw. I.	115
Statutum de Mercatoribus, or the Statute of Acton Burnel, 11 Edw. I.	116
Statutum Walliæ, 12 Edw. I.	120
Westminster the 2d, 13 Edw. I.	127
Chap. 1, xiv, xxv, xxx, xxxiii, xxxiv, xlii, xliv, xlviii.	
Statutum Wynton, 13 Edw. I.	149
Statuta Civitatis London, 13 Edw. I.	153
The	

x . STATUTES OBSERVED UPON.

The Statute of Circumspectè Agatis, 13 Edw. I.	158
Ordinatio pro Statu Hiberniæ, 17 Edw. I.	160
The Statute of Westminster the 3d, viz. Quia Emptores terrarum, 18 Edw. I.	167
Statutum de Monetâ, 20 Edw. I.	170
A Confirmation of the Charters, 25 Edw. I.	173
Statutum de Finibus levatis, 27 Edw. I.	176
A Statute for Persons appealed, 28 Edw. I.	180
Articuli super Chartas, 28 Edw. I.	182
Ordinatio Forestæ, 34 Edw. I.	188
Statutum de Apportis Religiosorum, 35 Edw. I.	190
Statutum de Militibus, 1 Edw. II.	192
De diversis Libertatibus Clero concessis, 9 Edw. II.	195
The Statute of York, 12 Edw. II.	196
The Statute of Effoyns, 12 Edw. II.	200
Statutum de Prerogativâ Regis, 17 Edw. II.	202
Modus faciendi homagium, et fidelitatem, 17 Edw. II.	206
The Statute for View of Frank-pledge, 17 Edw. II.	208
Statutum quod vocatur de Ragman (incerti temporis)	215
Consuetudines et Affisa Forestæ (incerti temporis)	217
Statutum armorum ad tornamenta (incerti temporis)	220
Statutum de Judaismo (incerti temporis)	222
Articuli et sacramenta Ministrorum in itinere justiciariorum (incerti temporis)	226
De Magnis Affeßis et Duellis (incerti temporis)	227
Statutes made at Northampton, 2 Edw. III.	229
Statutes made at York, 9 Edw. III.	232
The Statute of Purveyors, 10 Edw. III.	236
Statutum de cibariis utendis, 10 Edw. III.	240
Statutes made at Westminster, 11 Edw. III.	242
Statutes made at Westminster, 14 Edw. III.	244
The Realm and People of England shall not be subject to the King or Kingdom of France, 14 Edw. III.	252
A Confirmation of the Great Charter, and other Statutes, 15 Edw. III.	255
18 Edw. III. Stat. ii.	261
The Oath of the Justices, 18 Edw. III.	261
The Statute of Labourers, 23 Edw. III.	264
Of	

STATUTES OBSERVED UPON.

xi

Of those that be born beyond the Sea, 25 Edw. III.	268
The Statute of Treasons, 25 Edw. III.	270
A Statute of Provifors, 25 Edw. III.	276
Statutum de Stapulis, 27 Edw. III.	282
The Statute of Herrings, 31 Edw. III.	284
Statutes made at Westminster, 34 Edw. III.	286
Statutes made at Westminster, 36 Edw. III.	289
Statutes made at Westminster, 1 Rich. II.	296
Statutes made at Gloucester, 2 Rich. II.	314
Statutes made at Westminster, 5 Rich. II.	319
Statutes made at Westminster, 8 Rich. II.	324
A Statute made 10 Rich. II.	331
Statutes made at Westminster, 13 Rich. II.	333
Statutes made at Westminster, 20 Rich. II.	341
Statutes made at Westminster 1 Hen. IV.	348
Statutes made at Westminster, 2 Henry IV.	352
Statutes, 4 Henry IV.	357
Statutes, 5 Henry IV.	369
Statutes made at Gloucester, 9 Henry IV.	376
Statutes made at Westminster, 1 Hen. V.	380
Statutes made at Leicester, 2 Henry V.	384
Statutes made at Westminster, 1 Henry VI.	388
Statutes, 3 Hen. VI.	394
Statutes, 8 Hen. VI.	399
Statutes, 15 Hen. VI.	402
Statutes, 20 Hen. VI.	407
Statutes, 33 Hen. VI.	411
Statutes, 3 Edw. IV.	417
Statutes, 17 Edw. IV.	419
Statutes, 22 Edw. IV.	424
Statutes, 1 Rich. III.	431
Statutes, 3 Hen. VII.	438
Statutes, 4 Hen. VII.	441
Statutes, 11 Hen. VII.	451
Statutes, 12 Hen. VII.	460
Statutes, 3 Hen. VIII.	471
Statutes made at London, 21 Henry VIII.	477
Statutes	

Statutes made at Westminster, 23 Hen. VIII.	582
Statutes, 27 Hen. VIII.	493
Statutes, 31 Hen. VIII.	505
Statutes, 34 and 35 Hen. VII.	512
Statutes made at Westminster, 1 Edw. VI.	523
Statutes, 1 Mariæ.	531
43 Eliz. ch. ii.	535
Statutes made secundo, vulgò primo, James I. chap. vii.	543
21 James I. ch. xxvii.	549

OBSERVATIONS

ON

THE STATUTES.

MAGNA CHARTA,

9 Hen. III. A. D. 1225.

BEFORE any observation or comment is made upon the particular chapters of Magna Charta, it may not be improper to give a general reference to those writers who have professedly considered this most ancient of our statutes, which may at present be enforced.

The Great Charter and its regulations are sometimes transiently mentioned by *Bracton*, *Fleta*, and *Britton*, but I do not recollect that it is ever much dwelt upon, or commended, by them [a]; on the other hand, the *Mirror of Justices*, which was written either in the reign of Edward the First or Edward the Second, represents it to be very defective in many of the articles, and hath an express chapter *sur les défauts de la Grande Chartre* [b].

It:

[a] The preface to *Fleta* indeed makes mention of the *Charta Libertatum Angliæ, et Statuta*, as forming the first book, or division, of that work: this however seems to have been lost, as it begins to treat *de personis*. As for *Glanville*, he is supposed to have written before the *Great Charter*.

[b] *Mirr. des Just.* 309, et seq. It is remarkable, that the oldest book in the German law is entitled, *Spiegel*, or *The looking-glass*, which

B

answers

It is unnecessary to mention, that Sir Edward Coke hath written such a comment in his second Institute. It would be the highest presumption in any one to pretend to add to what this great lawyer hath advanced, if his observations did not happen to be made with a view totally different, and to arise from other materials. It seems almost as unnecessary to say, that, during the troubles, the 29th article [c] of this Great Charter, deemed the basis of our liberties and constitution, was frequently enlarged upon by Mr. Selden, and the other great lawyers of those times.

Since that period, though this 29th article hath been introduced into almost every political pamphlet, yet it is not, perhaps, worth while to refer the reader to any thing which hath since been published [d], till the introductory discourse by the very learned and ingenious Mr. Blackstone, prefixed to his publication of the Great Charter, and Charter of the Forest. In the fourth page of that introduction Mr. Blackstone says, that what is to be expected from him is, *An authentic and correct edition of the Great*

answers to our *Mirror of Justices*; it is inserted amongst Goldastus's *Collectanea*, and was compiled by *Eckius de Reckaw*. One of the ancient *Icelandic* books is likewise styled *Speculum Regale*, which was printed at *Soroe* (near Copenhagen) in 1768. In the preface to this work, *Britonis Aræmorici Speculum boni Principis*; *Godfridi Viterbiensis Speculum Regum*; *Philippini de Pergulo Speculum Regiminis*, and *Roberti Gervasi Speculum Morale legum*, are referred to. There is also, in Schrevelius's *Teutonic Antiquities*, a collection of the ancient laws of Pomerania and Prussia, under the title of *Speculum*. The same name being given to so many ancient law-books in different countries, cannot be the effect of mere accident, and probably means, that the points treated of are so inculcated, that one may see them *tanquam in Speculo*.

[c] Nullus liber homo, etc.

[d] Nath. Bacon hath written a comment upon some few of the ancient statutes. I shall rely upon great authority in saying, that he is a *partial and systematical writer on the constitution*. Confid. on the Law of Forf. p. 108.

Charter, and Charter of the Forest. This the public hath received from his hand; and great is his merit with the constitutional lawyer, the historian, and the antiquary: it appears, however, from what I have said in the Preface, that this no way interferes with, but rather promotes, the plan I have proposed to myself in these remarks. Mr. Blackstone hath procured and collated all the originals of the Charters which he could collect; I have only to add to this, that, besides the common editions of the Statutes, all of which necessarily include Magna Charta, there is an edition of it by Pynson, in 1519; another by Redman, in 14 Hen. VIII; and a third by Berthelet, in 1532; besides its being inserted in many of the old Chronicles. These cannot certainly be compared to originals, but may possibly deserve to be collated.

Having said thus much with regard to those who have already written with a view to explain or illustrate Magna Charta, it may not be improper to consider what was the intention of the Barons in this collection of statutes [e], as far as it can be inferred from the laws themselves, or the history of the times. It is well known, that, in the exposition of a statute, this is the leading clew in the construction to be made; and I cannot therefore but with diffidence contend, that it was not proposed to renew the Saxon laws, or those of Edward the Confessor; though this hath been so often advanced, and insisted upon. If this had been the intention, these laws of Edward the Confessor would have been expressly mentioned, as they are in the coronation oath, according to the ancient form of it [f]; there is nor, besides,

[e] Such a collection of laws is called, by Baluzius, a *Capitularium*, a term which I shall have frequently occasion to make use of. See his Preface to the *Capitularia Regum Francorum*.

[f] See this part of the form in Tyrrell's *Bibl. Polit.* p. 91. The reason given by Wilkins, why the laws of Edward the Confessor were so

OBSERVATIONS ON

besides, one Anglo-Saxon term, scarcely, for anything that relates to feudal tenures, which are the great objects of many of the chapters. There was, on the other hand, the strongest inducement to the Barons to wish the continuance of the Norman law introduced with the Conquest. Half the kingdom was held by feudal tenures under them: they were themselves the judges, having what the French call *Haute* and *Basse Justice*, and they expounded their own laws, the pleadings of which were likewise in their own tongue. The native English therefore, or their defendants, could not receive justice from courts so constituted, and which gave the Barons at the same time every kind of influence and power. It appears by the last chapter of the Charter, that all the attesting witnesses not in holy orders (as for the Bishops, Abbots, and Priors, they sign by their christian names, and that of their bishopric or priory) were of Norman extraction [g]. Whence then could arise the inducement to desire that the Saxon ordinances should be restored? The introducing the feudal law, on the other hand, with its attendant vassalage, was insisted upon by their ancestors, who had incurred so considerable an expence and risque, when they embarked with William the First in his enterprize: such adventurers had a right to claim their own terms, as we find likewise to be the

much extolled, arose from his having revoked all grants to Danes and Normans in favour of the Saxons, Wilkins, p. 200. Half of these ordinances also are to promote the interests of the Clergy, and hence Ingulfus styles them *leges æquissimas*.

[g] There are one and thirty laymen who attest the Great Charter; and I have compared their names with those who are said to have landed with William the Conqueror. [See Leland's Collect. vol. i. p. 202 and 206.] The result is, that eighteen of the names agree almost letter for letter, and consequently the persons so called were most probably descendants of the Norman invaders. As for the remaining thirteen, there are four or five who have no surnames at all; and therefore no inference can be drawn either one way or the other, as far as relates to them.

case

case with those who first undertook the conquest of Ireland, and the *Lacies* and *Mortimers*, who, as Lords Marchers, were employed to extend the English dominion in the adjacent counties of Wales. In short, is it probable, that, having every thing in their power, they would insist upon restoring a law, by which the grants made to their ancestors should be rendered doubtful, or at least stripped of their greatest advantages, and emoluments? I will not anticipate any observations upon the different chapters of Magna Charta any further, than by saying it will most fully appear, to any one who examines all the articles of this Charter, that the descendants of these Norman Barons were by no means forgetful of their own peculiar interests on this occasion; and therefore could never mean to abolish the Norman and feudal law, which was in every respect so highly advantageous to them.

MAGNA CHARTA, though it is printed in all editions of the statutes as a law made in the ninth year of Henry the Third, is, ^{died 1272} more properly, a transcript from the Roll of 25 Edw. I. who ¹³⁰⁷ then confirmed it by an *Inspeximus* [b] of the Magna Charta of his father.

This capitulary consists of Thirty-seven Chapters, which relate to things of so different a nature, that it is impossible to reduce the observations, by way of comment upon it, to any re-

[b] The collectors of French records style this kind of exemplification a *Vidimus*. The learned authors of the *Nouveau Traité de Diplomatie* (the first volume of which was published in the year 1750) mention, that Philip king of France sometimes used the word *Inspeximus*, instead of *Vidimus*; but that the kings of England have always begun these attested copies by the word *Inspeximus*. It is likewise there observed, that some of the French *Vidimus*'s do not tally exactly with the originals, but only recite the substance. *Nouv. Tr. de Dipl.* tom. i. p. 178. Paris 1750, 4^{to}. These compilers have formed a new word from such a *vidimus*, "cette piece fut *vidimée*," &c. vol. v. p. 177. and in many other places.

gular

gular order or connexion. I shall therefore begin any comment I may have to make, by only printing so much of a chapter as may give occasion to the explanatory remarks.

C A P. I.

INPRIMIS concessimus Deo, quod ecclesia Anglicana libera sit, et habeat omnia jura sua integra, et libertates suas illesas.] It is an observation of Sir G. Mackenzie [i], that every reign of the ancient kings of Scotland begins with a provision of a similar nature in favour of the liberties of the church. The same may be observed with regard to almost all the compilations of old laws: the reason is obvious. I should suppose, that the liberties of the *English Church* hereby insisted upon were chiefly its immunities from the papal jurisdiction, which had been so far extended in the reign of Henry's predecessor; otherwise those of the collective body of clergy would have been only mentioned. Thus likewise the French, to this day, insist upon the liberties of the *Gallican Church* in opposition to the Pope, which occasioned *Du Tillet's* compiling a learned treatise from the *French* archives, in 1602, on that subject. The laborious Prynne hath also collected three large Folios of records, to prove these immunities of the English church. The greatest part of the printed copies of his second volume was destroyed by the fire of London, so that it is not only scarce, but sold at an immense price: it contains however many curious and valuable records.

C A P. IV.

CUSTOS terre hujusmodi heredis non capiat de terra heredis nisi rationabiles exitus, et hoc sine destructione et vasto hominum et rerum.] From the expression of *vasto hominum et rerum* it appears, that the

[i] In his Observations on the Scotch Statutes.

villeins who held by servile tenures were considered as so many negroes in a sugar plantation.

There is in the *Dialogus de Scaccario*, written by Fitz-Niel, bishop of London, and treasurer in the reign of Henry the Second, a very particular description of what should be deemed *vastum*, or waste. “Si nemora sic excisa sint, ut subsistens quis in vix ex-
“stante succisæ quercus, vel alterius arboris stipite circumspiciens
“quinque succisas viderit, *vastum* reputabitur [k].” This dialogue hath uncommon merit as a literary production for those times.

It is likewise very singularly settled what shall be deemed waste by the Collection of the laws of Ina, in the Chronicle of Brompton, published amongst the Decem Scriptores, “Si quis
“lignum truncaverit sub quo triginta porci stare possint, xxx sol.
“emendet ad witam.”

Waste is thus described in an Ordinance of Philip le Bel, in the year 1302, “Ne facent aucun gäst, et s’il y a aucun arbre,
“qui ait esté gardé *pour sa beaulté*, ou pour sustentation de
“Maisons, qu’il soit encore gardé [l],” which does honour to the good taste of those times [m]. De Marchais [n] informs us, that, in some parts of Africa, the lopping off even the branches

[k] P. 29. Lond. 1711. printed at the end of Madox’s Hist. of the Exchequer.

[l] “Sciendum autem est eos, qui *arbores*, et maximè vites *cecidierint*,
“tanquam latrones puniri.” Caius in Duod. Tab.

It appears, by a speech of Lord *Verulam’s* against the abuses of purveyors, that those who were to provide timber for the king, even so late as the reign of James the First, used to extort large sums of money, by threatening that they would otherwise fell trees, which grew in avenues, or near the mansion-house. Works, vol. ii. p. 150. edit. 1765.

[m] Ordonn. Royales, p. 1. (Paris 1586.)

[n] T. i. p. 17.

of a tree is punished with death, which severity sufficiently shews the regulation to be the law of a sultry climate.

C A P. VII.

VIDUA post mortem mariti sui statim et sine difficultate aliqua habeat maritadium suum, nec aliquid det pro dote sua, et maneat in capitali mesuagio mariti sui per quadraginta dies post obitum mariti sui.

The Danish and Swedish laws [o] speak of the *annus luctus*, which is expected from the widow, during which she hath particular exemptions and privileges; and Tacitus observes, that, amongst the ancient Germans, it was esteemed *fœminis lugere honestum; viris meminisse*. The time for the widows mourning hath also been circumscribed, not only by the ancient laws of Rome to ten months [p], but by the more modern regulations of the Code Frederique to six [q]. The vanity of shewing excessive grief on such occasions is well known to be the loss of many lives yearly in the East-Indies, where the widow insists upon burning herself. By the ordinances of Canute, if the wife marries within the year, she forfeits her dower; and by the ancient laws of Spain, “if the wife is guilty of adultery during the husband’s life, or, after the death of her husband, marries again, she forfeits half her effects to the children of the first marriage [r].”

[o] Jus Danicum, Hafniæ, 1698. Leges Sueciæ, Holmiæ, 1743.

[p] Seneca de Consolatione, l. xvi.

[q] T. i. p. 127.

[r] “Si la moyer depost la morte del marito si casa con otro, o fizier adulterio, la meatad di todas suyas cosas receban los fijos dela, e del primer marido.” *Fuer. Jusgo*, lib. iii. p. 189. This collection of laws, called the *Fuero Jusgo*, is perhaps the most ancient in Europe, as those of Lindenbrogue and Baluzius go no further back, except in some few instances, than the time of Charlemagne; whereas Villadiego, in his Preface to the *Fuero Jusgo*, printed at Madrid in 1600, says, that some of these ordinances were then of more than a thousand years antiquity.

There was an absolute necessity for the provision of dower for the widow, as women at this time had no personal fortune to entitle them to a jointure by way of bargain on the marriage. If they had indeed any small portion of this sort, it was contrary to the customs and laws of the Northern nations that the husband should receive it. “Apud Gothos non mulier viro, sed vir mulieri dotem assignat, ne conjux ob magnitudinem dotis inflescens, aliquando ex placida conforte proterva evadat, atque in maritum dominari contendat [s].” And it may not be improper here to observe, that the English would more probably borrow a law or institution from the Goths and Swedes [t], than any other of the Northern nations, as there was a constant alliance between them, in opposition to the common enemy the Danes. Thus Olaus Magnus, in another part of his history, observes: “Nunquam enim legi Gothorum aut Sueonum reges sponte Angliæ bellum intulisse, sed quandam cognatam amicitiam contra Danorum violentiam et arma conservasse [u].” It

[s] Olaus Magn. Goth. Hist. lib. vii. cap. ix. Romæ 1553. folio 100. It is said proverbially in Hungary, “dotem accepi, imperium vendidi.” *Stiernhook*, and all the writers upon the ancient laws of the Northern nations, dwell much upon the *Morgengavium* (or *Morgengab*), which was the present made by the husband to his wife the next morning after consummation. It is singular therefore that we have no traces of such a custom, any further than by the Saxon term of *morgan-gife*.

In the Philippine islands, a certain proportion of the dower is payed to the intended wife after liberty of conversing with her, a greater share for the permission to eat with her, and the whole remaining part upon consummation. Gemelli, vol. v. Napoli, 1701, 12^{mo}.

[t] The ordinances of *Erick*, who lived in the twelfth century, were held in as great veneration by the ancient Swedes and Goths, as our laws of Edward the Confessor by the English. Olaus says, “Ad quas etiam nostris temporibus,” viz. the sixteenth century, “injustè oppressi perinde atque unicum innocentiae suæ præsidium confugiunt.”

[u] Lib. iv. c. 30.

must be admitted, however, that the Danish law prevailed on the eastern coast of England, and particularly Norfolk, Suffolk, as also Cambridgehire [w].

One of the reasons for the widow continuing forty days within the capital messuage was the apprehension of a supposititious child, which deceit was not uncommonly practised in these times, as may be inferred from the old writ *De ventre inspiciendo*. Thus likewise by the laws of Hoel Dda, there is still a greater anxiety to prevent this imposition, “*Fœmina, quæ se prægnantem affirmaverit*” “*tempore mortis mariti sui, in domo ejus manebit, donec con-*” “*stiterit utrùm prægnans fuerit, vel non; et tunc, si non fuerit*” “*prægnans, mulctam solvat trium vaccarum, et domum et fun-*” “*dum hæredi relinquat [x].*”

It is the fashion at present to laugh at what is called *Bishop Burnet's warming-pan story*; it appears, however, by Lord Clarendon's Journal [y], that Queen Anne, then princess of Denmark, gave credit to this report: and this imposition was actually carried into execution, according to some of the French chroniclers, by one of the ancient queens of France. There are also many regulations to prevent supposititious children in the King of Prussia's newly published Code Frederique. “*L'accouchement ne fera*” “*pas dans un lieu suspect, ou il y aura par exemple diverses*” “*issues—Et s'il fait nuit, il faudra qu'on tienne tout au moins*” “*trois chandelles allumées autour du lit.*”

C A P. XI.

COMMUNIA placita non sequantur curiam nostram, sed teneantur in aliquo loco certo]. The best comment on this chapter of

[w] Script. post. Bedam. See also Duck, p. 176.

[x] P. 78. See also the laws of Robert the First, p. 34. Reg. Maj. And for many regulations to prevent supposititious children, see *Fuer. de Espan.* as also *Pradilla's Suma de las Leyes Penales*, printed at Madrid, 1639, where the midwives being accomplices are ordered to be whipped.

[y] Published by Dr. Powney.

Magna Charta seems to be the parliamentary exposition by 28 Edw. I. ch. iv. which shortly says, that Common Pleas [z] should not be held in the Exchequer, contrary to the form of the Great Charter. Now this is the only mention made where Common Pleas are to be determined, throughout Magna Charta; and consequently it should seem that the legislature meant chiefly to prevent the undue influence of the crown in the Exchequer, which probably was then a mere court of revenue [a].

Prynne [b] cites a writ at length of 6 Edw. III. by which that king fixes the court of Common Pleas *in Ireland* in the city of Dublin, according to the spirit of this chapter of Magna Charta.

It appears likewise, by the *Annals of Waverley*, that the Judges of the King's Bench, and Barons of the Exchequer, attended Edward the First to Shrewsbury in one of his expeditions into *Wales*, and resided there a considerable time: the court of Common Pleas, therefore, continuing at Westminster, in consequence of this article of Magna Charta, must have been attended with great benefit to the subject, whose suit must have otherwise been carried on with an unnecessary and extraordinary expence at Shrewsbury, or some perhaps more distant place from the capital. Fabian mentions that the records, when sent back from Shrewsbury in the reign of Edward the First, received much damage from the rain [c]. This was another inconvenience therefore which was remedied by this part of Magna Charta.

[z] Lord Bacon supposes that the Court of Common Pleas was erected in the reign of Henry the Third. Vol. ii. p. 378.

[a] It appears by later statutes, that the Barons of the Exchequer were not considered in every respect as bearing the same offices with the Justices of the King's Bench, and Common Pleas. See 27 Edw. I. ch. ii.

[b] Animadversions on the fourth Inst. p. 52.

[c] Chron. Part ii. p. 124.

CAP. XIV.

LIBER homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti, salvo contenmento suo: et villanus alterius quam noster eodem modo amercietur, salvo wanagio suo]. Selden, in his Table-talk, says, that the word *contenmentum* signifies the same with countenance; as used by the country people, when, intending to receive a person with hospitality, they say, *I will shew you the best countenance*, &c. So that the meaning of Magna Charta is, a man shall not be so fined, but that he may be able to give his neighbour good entertainment. Lord Verulam uses the word *countenance* in the same sense: "There is never a gentleman that has over-reached himself in expence, and thereby must abate his *countenance*, but he will rather travell, and do it abroad than at home [c]."

The *Wanagium* here mentioned, or what is necessary for the labourer and farmer for the cultivation of his land, hath always been favoured by the laws of most countries. Thus, by the ordinances of Provence, "Item que per inquisition ou autre cause, aucune persona de Provença non deia effer agaida en armes, cavales, buous, ou autres bestias d'arayre, si non en defaultiment d'autres bens [d]." The *poinding averia* [e] *carucæ* is criminal by

[c] Works, 4^{to}, vol. ii. p. 175. Thus also Fitzherbert uses the word *countenance*: "Saveinge to a gentylmanne his countenaunce, and his householde; to a merchaunte his marchaundise; and a husbände his tenury;" part of the oath of an *affeeror*. Fitzh. Husbandry, p. 41. ed. 1767.

[d] Du Moulin, vol. ii. p. 1245. As this citation from Du Moulin is in the *Basque* language*, spoken by the inhabitants of Gascony, and the other Southern provinces of France, I shall here subjoin a translation of it, as it consists of a mixture of French and Spanish. "Also that by *inquisition* [Ferretier's Law Dictionary thus explains this word, "Inqui-

* "Ce langage tient sept journées." Scaligerana, p. 10.

"fition

by the law of Scotland; and the stealing a plough is a capital offence by the ancient laws of Pomerania. "Rotæ etiam
 "subjicitur qui aratrum quod manè in agrum fuit deductum
 "aut in domum reducitur spoliatur, aut rusticum (occupatum circa
 "aratrum) aliquo modo lædit, aut ipsi aliquid sumpfit, quod tres
 "denarios valet [f]." To these the laws of the state of Lucca
 likewise add barrels and casks during the vintage, which are
 not permitted *intefiri* [g], or to be distrained [h]. A Spaniard
 insists upon his horse or arms not being taken in execution,
 "Ni los sean tomadas por deudas sus armas, ni cavallos [i]."
 A Frenchman's dress is privileged by their ancient laws, "per
 "deptes, non fiont prezas vestiduras con porte chascun jorn [k]."

"fition est la recherche que le juge fait des crimes qui sont venus à sa
 "connoissance par commune renommée, sans qu'il y ait aucun denoncia-
 "teur"] or on any other account, no inhabitant of Provence shall be aggrieved
 "(agaida used corruptly for agraviada) in his arms, horses, oxen, or other
 "beasts used for ploughing, by their being distrained, except they have no other
 "goods." Du Moulin is generally styled the French Papinian; Gianone,
 however says, that he is a very inaccurate writer (Istor. di Nap.); and his
 own works prove that he had an arrogance, which is seldom observed in
 a man of real learning and abilities; "Ego qui nemini cedo, et qui a
 "nemine possum doceri" (in his Life prefixed to his works); which is
 beyond the self-conceit of a Scaliger, or a Bentley.

[e] The Scotch still use the word *aver* in this sense; thus in Kelly's
 collection of Proverbs, "A kindly *aver* was never a good nag."

[f] Speculum Suevicum, c. clxvi. § 15. The offence of stealing a
 plough from the field would not now be punished capitally, when the laws
 against theft are so much more severe than they were some centuries ago.

[g] This word is not to be found either in Du Cange, or the lately-
 printed Supplement by Carpentier. The meaning of it is however most
 clearly as translated above, it occurring frequently in this Code of Laws.

[h] St^a. Luccensis Civitatis, l. i. c. 139. Luccæ, 1539, Folio.

[i] Las Leyes de Navarra, p. 226. collected and printed at Pampeluna,
 1614. Those of a Knight could not be distrained also in England, du-
 ring the reign of Hen. II at least. See Dialogus de Scacc. l. ii. c. 16.

[k] Thaumasiere's Comment on Les Assises de Jerusalem, p. 245.

The

OBSERVATIONS ON

The Chronicle of St. Albans explains the necessity there was for moderating both amercements and distresses. The commons complained; "quod rex, scil. Henricus, quicquid habuerint in "esculentis et poculentis rapuit: rusticorum enim equos, bigas, "vina, victualia ad libitum cepit." The representations against this oppression, however, afterwards occasioned the king's giving a charge in person to the Barons of the Exchequer: "Nullus "rusticus distringatur pro debitis domini sui, quamdiu dominus "habuerit per quod distringi possit. Inquirendum est etiam "qualiter magnates se gerunt versus homines suos; at si in- "venerint ipsos transgredientes, corrigant quatenus poterint." From this it appears, that the tenant was not only oppressed for his own debts, but likewise for those for his lord. The town of Aylesbury held lands by the service of keeping the beasts distrained for the king; which shews that these seizures were very frequent, and therefore probably often oppressive. The manor of Byker, in Northumberland, likewise was granted by the same tenure. The law with regard to amercements is laid down by Bracton in the words used in this fourteenth chapter of Magna Charta, without taking notice of its depending upon this statute, which seems to prove that it is only declaratory of the Common Law.

C A P. XXII.

NOS non tenebimus terras illorum qui convicti fuerint de feloniam, nisi per unum annum et unum diem; et tunc reddantur terre ille dominis feodorum.] The same law prevails in France with regard to the king's holding the land of criminals, and for the same time: "Les fruits des immeubles de celuy qui est condamné par justice "royale appartiennent au roy pour la premiere année exempts de "toutes dettes, autres que les rentes seigneuriales et foncieres "deuës pour la dite année: et oultre il a les meubles du con- "damné, les dettes préalablement payées." "Ce droit est don- "né

“né au roy à cause de sa souveraineté, et peut-estre aussi en con-
 “federation de la charge qu’il a de faire faire les proces par ses
 “officiers, et que par fois selon les occurrences l’on prend les
 “frais sur la recepte du domaine [1].” The addition of the
day seems to have been made with an intention of preventing
 all disputes about inclusive and exclusive.

This term of a *year and a day* is likewise used in the Danish
 law. “Si agricola domum reliquerit, vicini per annum et diem,
 “quo minus destruat, custodiant [m].” It is also the precise
 time during which the feudary is to apply to his Lord for
 investiture :

“Successor feudi, totum si forte per annum

“Atque diem, tacto primæ jam tempore pubis,

“Sive dolo, seu desidia, seu mente superbâ,

“Spreverit à domino feudalia poscere jura,

“Perdat, et hæc dominus proprios assumat in usus.”

Gunter, lib. viii.

C A P. XXIIH.

OMNES *kidelli* deponantur decetero penitus per Tamisiam et
Medeweyam, et per totam Angl^a, nisi per costeram maris.] These
 wears or cruves [n], as the word *kidellus* is sometimes translated,
 both obstructing the navigation of rivers, and being the means of
 destroying the fish, are frequently prohibited both by the ancient
 English and Scotch statutes. The navigation of rivers [o] hath

[1] See Coutume Reformée de Normandie, vol. i. p. 387.

[m] Jus Dan. p. 292.

[n] This word is derived from the French word *creve* or *crue*. Bou-
 lainvilliers mentions their great inconvenience in the *Rhine*; vol. i. p. 207.

[o] The old French law, collected in the Institutes Coutumières, lays
 down with precision the distinction between rivers: “*Grosses rivières* ont pour
 “le moins 14 pieds de largeur, les *petites* 7, et les *ruisseaux* 3½.” p. 55.

been.

been more early attended to [p] in all countries, than the other method of conveying commodities by land carriage [q]; and as most parts of Europe were at this time of the Roman catholic persuasion, the preservation of fish was necessarily a greater object than it is at present. It appears by the old chronicles, that there were *kidelli* or wears anciently below London-bridge, as well as above it: these were not destroyed till 7 Hen. IV, when all these obstructions, from Stanes to the Medway, were removed [r]. The archbishop of Canterbury gave great opposition to this regulation, who probably owned some of these wears, and, from his influence, had prevented this chapter of Magna Charta from being put in execution till that time.

The wears, besides other inconveniences, prevented floats of wood from coming down the rivers, which must have been very sensibly felt formerly in this country, as coals were little used. This right makes a considerable head of German law, under the name of *Jus gratiæ die floss, oder, floss gerechtigkeit* [s].

[p] Henry the First is said to have joined the rivers of Trent and Witham; and there is another regulation in Magna Charta *de riparibus*.

[q] The First statute which relates to the highways is 13 Ed. I. ch. v. *Stiernbook* indeed makes the following very minute distinctions between what are called highways, and which seem to prove an early attention to them: "viz. *Allmanna-wagh*, i. e. *via publica*; *Könung-wagh*, *via Regis*; *Jarl wagh*, *via viri*; *Ting-wagh*, *via judicii*; *Kiörto-wagh*, *via ecclesiæ*." *De Jure Sueonum vetusto*, l. ii. § 7. p. 297. The Romans, in the polished age of Augustus, however, had no means of raising an assessment for the repairing the roads: the Emperor therefore did this at his own expence. See Dio Cassius, lib liii. When Julius Cæsar also first became Consul, he looked upon it as a high indignity, that the Senate proposed to add to this office the superintendence of the highways. See Suetonius in his Life.

[r] Stow, p. 333.

[s] Krebs, *de Jure Ligni et Lapidum*, p. 318. Coals were first used in London in the reign of Edward I; and the smoke was supposed to corrupt the air so much, that he forbade the use of that kind of fuel by proclamation. Stow's London, vol. i. p. 2.

The

The pulling down of wears is one of the articles given in charge at the court of Eyre[t].

C A P. XXV.

UNA mensura vini sit per totum regnum nostrum, et una mensura cervisie, et una mensura bladi, scilicet et una latitudo pannorum. De ponderibus vero sit, sicut de mensuris.] It is remarkable, that, in the old Scotch laws, the measure of Caithness is referred to as a standard, which was probably, from its situation, the most uncivilized part of the country [u].

It is a very early regulation throughout Europe, that there should be only one measure [w]; this is likewise very frequently enjoined by subsequent laws, which appear never to be carried into execution. Montesquieu [x] says, *It is the mark of a little mind in a legislator to attempt regulations of this kind*; but he should rather have contended, that it does not shew wisdom to attempt what appears, by long experience, to be impracticable, though in theory it seems to be attended with no great difficulties, and much to be desired for general convenience: with us it hath occasioned at least six different statutes, all of which have proved ineffectual. Within these few years also a committee of the House of Commons took infinite, but fruitless pains, to establish such a regulation.

It appears, by Fabian's Chronicle, to have been customary in the reign of Henry the Third, to hang the scales in such a man-

[t] Fleta, l. i. c. 20.

[u] See the Laws of David II, c. xiv.

[w] Henry the First made the standard for a yard to be taken from his own arm; and one of the Chronicles says, that he was *magni et proceri corporis*.

[x] *Esprit des Loix*. It was one of the articles of the famous Achæan league, νομοις χρᾶσθαι τοις ἀλλοις, καὶ σταθμοις, καὶ μέτροις. Polyb. p. 125. ed. Casaub. It was also enjoined by the Jewish law, Deut. xxv. 13, 14.

ner, that the buyer was to have an advantage of 10 or 12 pounds in a hundred; there was about this time, however, a by-law made by the corporation of London, that the scales should hang even, and that the buyer should be entitled to an allowance only of 4 lb. This regulation, reasonable as it was, they were obliged to defend before the king in council.

C A P. XXIX.

NULLUS liber homo capiatur vel imprisonetur aut disseisetur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur: nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terre. Nulli vendemus, nulli negabimus aut differemus rectum vel iustitiam.] Much hath been written upon the antiquity of the trial by jury in England, and whether the same method of decision hath been used in other countries. It is clear by the *Regiam Majestatem*, which in most particulars is the same with our Glanville, that this trial was used in Scotland, in civil matters, so early as David the First, who began his reign in 1124. "When the *twelve royal men* compeer and pass upon the assize, they shall proceed and try quhilk of the parties, the persewer or the defendand, hath best right to the londs claimed [x]."

It appears from Olaus Wormius [y], that the trial by twelve men was first introduced into Denmark by Regnerus, surnamed Lodbrog, who began to reign in the year 820; from whom Ethelred is said to have borrowed this institution: they are called in the Danish Law *Sande-mæn*, which is rendered *Viri veraces* [z].

Pontop-

[x] This is cited from Skene's translation of the *Regiam Majestatem*, B. I. c. xiii.

[y] Mon. Dan. lib. i. cap. x. p. 72.

[z] *Gesta Danorum extra Daniam*, Hafniæ, 1740. *Stiernhook* gives us this account of the term *Sanneman* in the old Swedish and Gothic laws, which he says had the *Nembda*, or trial by twelve men: "Qui quòd de-
' puta

Pontoppidan says, "Desiit apud nos duodecimvirale hoc judicium, "remanentibus tamen ejusdem vestigiis." The material difference between these twelve judges, and an English jury, consists in this; that the English jury is only impaneled for the decision of a particular cause, whereas these twelve judges in Denmark determine all lawsuits within the jurisdiction of their court. It is not improbable, that our jury formerly decided all controversies within a certain district, without the assistance of a judge, as questions were not then so intricate as they are at present: and we are very much in the dark, about their manner of proceeding, till the time of Edward the Second, when the Year-books begin. It is much to be lamented therefore, that we have not a collection of the cases, which Chaucer says, *his man of law* carried in his head:

"In Termes had he case and domys al,

"That fro the tyme of King Welyam was fall;"

as, going further back, they must have necessarily thrown infinite light upon questions of this sort.

There is a passage in Clarke's Preface to the Laws of Hoel Dda, which, at the same time that it shews this method of trial was in use amongst the Welsh, accounts in some measure for the unanimity of the petit, which is not required from the grand jury. His words are these: "Sacramentum minus, vel (ut cum
"Wallis loquar) *Llw rheithwr nod*, juramentum compurgatorum
"inferiorum, hoc erat; cum homines non ingenui jurabant se
"credere juramentum accusati esse verum: sacramentum alte-
"rum, *Llw rheithwr arall*, cum homines ingenui jurabant sibi

"putati essent *Namdeman* vocabantur, quòd duodecim *Tofman*, quòd in-
"tegræ vitæ, *Sanneman*, quòd senes *Oldungar*." Cap. iv. p. 53. Holmiæ, 1672, 4^{to}. This trial, by the *Nembda* or jury, is now disused in Sweden in all cases where the point can be proved by witnesses (see *ibid.* p. 59); and indeed when it prevailed, the unanimity of the jury was not required, which makes the great singularity of this method of deciding controversies in England.

“verisimilius videri, quod accusatus ante juraverat. In inferior
 “genere, si unus solummodo compurgatorum juramentum de-
 “tractaverit, reliquorum testimonium nihil valuit [a].”

The unanimity of the twelve jurors in their verdict must be admitted to be a very singular institution. It should seem that the reason for requiring this, at least in criminal prosecutions, arose from compassion to the prisoner; against whom if the offence was not proved beyond all possibility of doubt in the most scrupulous juror, it was thought to be erring on the merciful side, that this single *veto* should acquit him. Another reason for this unanimity might possibly have arisen from attainments being frequently brought in ancient times against juries, to which punishment every juror was liable: as each individual, therefore, might be subject to a conviction in such a prosecution, it might be reasonable that every one should have a power of dissenting, and not be concluded by the opinion of others. The first of these reasons may account for the necessary unanimity in criminal suits, and the latter in those of a civil nature, in which cases only the prosecution of attainder took place. Another cause for the unanimity [of a jury might possibly arise from their being unwilling that individuals might be obnoxious to the crown, or perhaps parties, if the opinion of each was separately known. When the verdict was unanimous,

Defendit numerus, junctæque umbone phalanges.

In the time of Henry the Third, it should seem, from a passage in Bracton, that this unanimity was not required from the first twelve who were impaneled. “Contingit etiam multotiens
 “quod juratores in veritate dicendâ sibi sint contrarii, ita quod in
 “unam declinare non possunt sententiam, quo casu de consilio
 “curiæ afforcietur assisa (i. e. the number of jurors shall be in-
 “creased), ita quod apponantur alii, juxta numerum majoris

[a] P. xiv.

“partis

“partis quæ dissenserit, vel saltem quatuor, vel sex, et adjungantur aliis [b].” This continued likewise to be the practice in the next reign, when Fleta is supposed to have been written. “Si autem juratores sibi invicem fuerint contrarii, quia in unam non poterunt ire sententiam, *in electione justiciariorum erit vel assisam afforciare* per alios, dum tamen summonitos juxta numerum majoris partis dissentientis, vel eosdem juratores *compellere ad concordiam*, quòd vicecomes videlicet ipsos sine cibo et potu custodiri faciat, donec unanimes fuerint vel concordes [c].” This passage shews, that the judge had a power of insisting upon the unanimity of the first jury impaneled; and as it was probably found, when new jurors were added, that it was in reality the trouble of trying the cause over a second time, and so *toties quoties*; at last, for the greater dispatch of business, they insisted in all cases upon the unanimity of a jury. There are perhaps many Englishmen, and even lawyers, who do not know, that in Scotland the unanimity of a jury is not required, except in revenue causes before the court of Exchequer, and that the chancellor or foreman gives the verdict upon a majority of a single juror: they therefore consist of an odd number, viz. fifteen, and are chosen out of five and forty returned by the sheriff; the pannel or criminal having a right to challenge, as by the English law. Fabian, in his Chronicle, gives a very particular account of the mayor and aldermen of London claiming privileges in the reign of Henry the Third [d], viz.

[b] Brañ. lib. iv. cap. 19. See also Glanvill. lib. ii. c. 17.

[c] Fleta, lib. iv. cap. 9.

[d] These privileges claimed by the citizens of London are alluded to in a grant of King John's to the city of Lincoln, in the first year of his reign: “Concessimus etiam quod de placitis coronam tangentibus, se possint *dirationare* (i. e. clear themselves), secundum consuetudinem civium civitatis Londoniæ.” Rot. Ch. 1^{mo} Johannis Regis, N. 35. Petyt. Mss. vol. i. p. 10.

that

that for a trespass against the king, a citizen should be tried by twelve of his citizens; for murder, by thirty citizens; and for trespass against a stranger, by the oath of six citizens, and himself. Can it be contended after this, that the trial by twelve jurymen was thoroughly introduced; or are there any passages, in the old historians, which clearly prove it to have been so established, before the time of Henry the Third?

Hickes, in the second volume of his *Thesaurus*, lays it down without hesitation, that this method of decision was entirely unknown to the Saxons; and no one had looked so deeply into Saxon learning as himself. His authority is likewise the greater, because he writes this part of his learned work in a letter to Sir Bartholomew Shower, who may therefore be supposed to have thought in the same manner on this head [e].

The latter part of this chapter of Magna Charta is calculated to prevent abuses in the crown with regard to the administration of justice. It was usual to pay fines anciently for delaying law proceedings even to the extent of the defendant's life; sometimes they were exacted, to expedite process and to obtain right [f]: and in some cases, the parties litigant offered part

[e] See Hickes's *Thef.* vol. ii. p. 34, & seq. He supposes the trial by jury was introduced into England about the time of Henry the Second.

[f] The county of Norfolk (always represented as a litigious county, in so much that the number of attorneys allowed to practise in it is reduced, by a statute of Henry the Sixth, to eight) payed an annual composition at the Exchequer, that they might be *fairly dealt with*. Madox's *Hist. Excheq.* p. 205.

“ Norfolk full of wyles,

“ Suffolk full of styles.”

E cod. Membr. penes Thom. Rawlinson, prefixed to the 5th vol. of *Lel. Itin.*

“ Long more earnestly for the term, than Norfolk lawyers.”

The City Match, amongst Doddsley's Collection of Old Plays, vol. x.
of

of what they were to recover, to the crown. Madox [g] collects, likewise, many instances of fines for *the king's favour*; and particularly of the dean of London's paying twenty marks to the king, that he might assist him against the bishop, in a lawsuit [b]. *William Stutevill* presented to King John three thousand marks, for giving judgement with relation to the Barony of Mowbray, which *Stutevill* claimed against William de Mowbray [i].

To the honour of the very pure administration of justice in this kingdom, at least since the Revolution, we can hardly suppose such a practice to be avowed and established in a civilized country. But it must be remembered, that Charles the Second, in appeals to the house of lords, used to go about whilst the cause was hearing, and solicit particular lords, for appellant or respondent [k]; and England is perhaps the only country in Europe, where the judges are not solicited in the face of the sun [l]. Whitelock, then a barrister, applied to the judges with regard

[g] History of the Exchequer.

[b] John of Salisbury however mentions a bribe being offered to Pope Eugenius, by a Prior who had a cause depending at the court of Rome, which, to his honour, he rejected. *De Nugis Curialium*, p. 264.

[i] Petyt Mss. vol. i. p. 57. where the proceedings may be likewise seen.

[k] Burnet's History. An instance of such interfering by Q. Elizabeth is also mentioned in Hurd's Dialogues, vol. ii. p. 67.

[l] It likewise appears by many letters written by the Duke of Buckingham to Lord Verulam, that he solicited the Chancellor in particular causes. It must be owned, however, that the recommendation is guarded, and such as might be expected from an able minister, and man of the world. One should suppose, that Dr. Donne had seen some of these letters, as he expresses himself thus in his 5th Satire:

"If law be in the Judge's heart, and he

"Have no heart to resist *letter*, or fee,

"Where wilt thou appeal?"

Sir Thomas More (when Chancellor) always declined every kind of present. Erasmus's account of him.

And,

regard to a prosecution for a libel on his father, who had been on the bench, and was then dead. The libeller was indicted after this previous conversation, and convicted [m]. Oliver Cromwell also interfered in the decision of the Scottish judges whilst he was Protector [n].

“In sessions and sifes we bear the stroke and sway,
 “In patents, and commission of quorum always chiefe,
 “So that to whether soever we did way,
 “Were it by righte or wronge, it passed without reпреse,
 “The true man we let hange, sometimes to save a thefe,
 “Of golde and of silver our handes were never emptye,
 “Offices, fermes, and fees fell to us in great plentye [o].”

From this practice being so universal, *Hobbes* contends, that he whose private interest is to be decided in an assembly, may make as many friends as he can; and though he procures them with money, yet it is not injustice [p].

And, with regard to the judges being bribed, afterwards,

“Judges are Gods, and he who made them so,
 “Meant not men should be forc’d to them to go
 “By means of *angels*.”

The Satyrist here plays upon the ambiguous sense of the word *angel*, signifying both a coin and a messenger. Lord Bacon mentions two silver flaggons being presented to Sir Thomas More by a suitor in Chancery. See his *Apophthegms*, N° 119. Hesiod, who had a troublesome lawsuit with his brother *Perseus*, is eternally inveighing against this practice, which prevailed even in such ancient times of supposed simplicity; he calls the Bæotian judges more than once *δαροφάγοι*, or *devourers of presents*.

[m] See *Whitelock's Labours Remembered*, in the Annals of his Life.

[n] See notes on the Catalogues of the Lords of Session, by Sir David Dalrymple, Edinburgh, 1769. 4^{to}.

[o] Sackville's Account of Robert Tresilian and his Fellowes.

[p] See Lord Clarendon's Survey of the Leviathan, p. 192. The Emperor Basilus, to his great honour, abolished this corrupt custom. Byz. Hist. Constant. Porphy. p. 119. ed. Ven. 1729.

CAP. XXX.

OMNES mercatores, nisi publice antea prohibiti fuerint, habeant saluum et securum conductum exire de Angl', et venire in Angl', et morari et ire per Angl', tam per terram quam per aquam, ad emend' et vendend' sine omnibus toltis malis, per antiquas et rectas consuetudines.] Montesquieu much commends the national humanity of this article of Magna Charta, the less to be expected from us as islanders, who, like the inhabitants of Ithaca in the time of Homer, are always represented as *hospitibus feri*:

Ου γαρ ξανες οιδε μαλ' ανθρωπους ανεχονται,

Ουδ' αγαπαζομενοι φιλεουσ' ος κ' αλλοθεν ελθοι.

Hom. Od.

By an ancient ordinance of the Wisigoths, merchant strangers are not only to be well treated, but tried by their own laws [q]. By the Saxon regulations: "Quinetiam si maris acta tempestatibus
"ad domicilium aliquod illustre, ac pacis beneficio donatum,
"navis appulerit inimica, nautæ ac res illorum omnes augusta
"pace potiuntor [r]."

The plundering of shipwrecked goods is likewise made capital, in the year 1221, by an ordinance of Sicily [s]: it is rather to our reproach, that the same offence hath not been punished with death in England, till the twenty-sixth year of the late king.

There is a law in Lindenbrogue's collection, which does great honour to the ancient Bavarians, in favour of foreigners and strangers: "Si autem aliquis tam præsumptuosus fuerit, ut pere-
"grinis nocere voluerit, xiv sol. mulctetur. Deus nam dixit,

[q] Fuero Jusgo, lib. ii. p. 436.

[r] Ll. Æthelr.

[s] Pragmaticæ Regni Siciliae. Pandrmi, 1637. It is rather hard on the Sicilians, after having established so humane a law before the other nations of Europe, that it should have become a proverbial saying,

"Omnes insulani mali, Siciliani autem pessimi."

Veryard's Travels, p. 233.

"Pere-

“*Peregrinum et pauperem non contristabis de rebus suis* [t].” On the contrary, the stranger had not the same protection from the Welsh laws: “*Tres sunt homines, quibus multa pro injuriâ eis illatâ non debetur; scilicet furiosus, alienigena, et leprofus* [u].”

It may be said, to the honour of humanity, in every part of the globe where any sort of civil policy or settled government is established, that the making prisoners those who are shipwrecked on their coasts is peculiar to Japan [w]. This regulation, barbarous as it is, seems to have arisen from the total exclusion of foreigners since the expulsion of the Portuguese, who attempted to alter the established religion of the country [x], as their ports before this were open. The *Cypriots* made a law, indeed, that if any Jew should be cast on their coasts, he should be immediately knocked on the head; but this is said by *Dio Cassius*, to have been caused by their

[t] Lindenb. p. 412. *Ye shall not vex a stranger, nor oppress him; for ye were strangers in the land of Egypt.* Exod. xxii. 21. “Hospitalitate insignes sunt Sueones, quibus est omni probro gravior, hospitium negare transeuntibus. Quædam jura adeo hospitem securitati favent, ut cum vitæ civium parcant etiam in gravissimis criminibus (puta parricidiis), necatorem tamen hospitis peregrini, vivum cum mortuo colligari, et puniri mandent.” *Stiernhook, De Jure Sueonum vetusto*, l. ii. c. 9.

[u] Leg. Hoel. Dda, p. 330.

[w] See Kempf. in Append. p. 53. 71, 72. Thus Euripides, in his *Helena*, speaks of it as a law, which prevailed universally:

Ναυαγος ηκω ξενος, ασυλητον γενος.

And Dion of Prusia, in his 7th Oration, Μη γαρ ειη ποτε, ω Ζευ, λαβειν, μηδε κερδαναι κερδος τοιςτον, απο ανθρωπων δυσυχιας.

[x] “L’an 1583, on accorda aux Jesuites la permission de s’etablir à Meaco mais à condition de ne persuader à aucun Japonois de se faire Chretien, mais à peine leur cloître fut il bati qu’ils precherent le Christianisme.” *Ambassades vers les Empereurs de Japon.* Amst. 1680, Folio, p. 141.

having

having been guilty of great cruelties to the inhabitants of that island [y].

C A P. XXXIV.

NULLUS capiatur aut imprisonetur propter appellum femine de morte alterius, quam viri sui.] Appeals are so much disused at present, that we may be apt to conceive, no regulation with regard to them can be of any great constitutional importance; there were reasons, however, to prosecute offences in this manner, rather than by indictment, which do not hold at present. One of the methods, by which not only the kings of England, but of other parts of Europe, raised money at this time, was by pardoning crimes for considerable sums of money; which appears by the many old laws restraining this most excellent and humane prerogative as it is now exercised. The ancient punishment for murder was a *weregild* [z], paid as a satisfaction to the nearest relation; and it was therefore a most crying abuse of power in the king, not only to pardon this most heinous crime [a], but in consideration also of the mulct, which otherwise should have been given to the relation who prosecuted. It is in this sense, I should apprehend, that Lord Chief Justice Holt hath somewhere called an appeal, *a most noble birthright of an Englishman*, because it is a right which the crown cannot deprive him of. Bracton, an almost contemporary expositor of this statute, says, that the appeal given to a woman is confined to the death of her husband *inter brachia sua interfecti—si de visu*

[y] See Dio Cassius, l. lxxviii. sub fine.

[z] “Uno enim infelici casu duos de medio tolli non ferebant.” There are most minute regulations with regard to the appeal for murder, in *Les Assises de Jerusalem*, where it is laid down, “que plait de murtre est mout *soutil* :” see ch. lxxxiii. et seq.

[a] One of the reasons given for a general pardon passing both houses on only one reading is, that they must accept it cheerfully, without examining the terms upon which the king grants it.

loquatur: the occasion of which restriction seems to be, that when a woman prosecuted, the appellee lost his right of defending himself by combat.

There are regulations with regard to appeals in many parts of Europe. Thus by the Danish code, "*jus accusandi ex hoc delicto hæredibus proximis competit* [b]." So likewise by the ancient law of Scotland: "It is to wit, that in the plea anent murder, the wife may be admitted to accuse, because the man and his wife are but one flesh [c]." In other cases, as by the Danish law, the nearest in blood is to appeal. The reason of the confining this right to relations, appears by the following passage from the *Affises of Jerusalem*: "Et mout de meaux en pouroit on faire, si chascun qui seroit fort, et grand, pouroit devenir champion." Cap. xcii.

We derive appeals from the Germans: "Suscipere enim tam inimicitias seu patris, seu propinqui, quam amicitias necesse fuit [d]."

[b] Leg. Dan. lib. vi. cap. vi. art. 3.

[c] Acts Jam. I. Upon this citation from a Scotch statute, it may not be improper to take notice of the different forms required for a Scotch act of parliament, from those steps or ceremonies through which an English statute passes before it becomes an obligatory law. About twenty days before the holding of the parliament, proclamation was made to deliver in to the king's clerk, or register, all bills to be exhibited that session. *Then only such as I allow of are put into the chancellor's hands to be propounded to parliament; and after this, before I put my scepter to a law, I order what I please to be erased. Surely this amounts in me to a negative voice.* King James the First's Speech at Whitehall to the Parliament. King James's Works, p. 523. Lord Kaimes explains this negative voice to have been given to the king by an act of his own reign, viz. in 1603. See *Essays on Brit. Antiq.* p. 31.

[d] Tac. de Mor. Germ.

CAP. XXXVI.

NEC liceat de cetero alicui dare terram suam domui religiosæ, etc.] This chapter contains regulations against the giving lands to religious houses, with intent to resume them again by a tacit agreement with the monastery, and to hold them afterwards under such a body in order to defeat the lay lord of his suits and services. For this ingenious device, the religious houses had undoubtedly a proper consideration, besides the chance of succeeding to such estates on defect of heirs, which did not unfrequently happen in these times, both on account of the owner's not having a power to make a will but by custom, nor even where he was thus empowered, to procure any one who could reduce his bequest into writing. How the regulations of this, as well as many other subsequent statutes to the same purport, were evaded, may be seen in Sir Edward Coke's Comment on this Article of Magna Charta.

In the next century, the clergy's soliciting benefactions became subject of reproach; for we find in Piers Plowman's Vision,

"The Friars followed folke that were rich,
 "And folke that were poor at little price they fet;
 "And no Cors in the Kirke yard ne Kirke was buried,
 "But quick he bequeath'd them ought, or quit part of his debt."

And Chaucer says of a fryar,

"Full sweetly heard he confession,
 "And pleasant was his absolution.
 "He was an easy man to give pennance,
 "There as he wist to have a good pittance."

Nor was this satire, on the rapaciousness of the clergy, confined to England, always represented as a country of libertinism; for the famous Jehan de Mehun, author of the *Romant of the*

the Rose [e], left to a monastery in France, a chest filled with nothing but vetches; and the friars, enraged at the ridicule and disappointment, would not suffer him to have Christian burial [f]. Pasquier likewise cites some verses from Hugues de Bersy, who lived in the time of St. Lewis, than which nothing can contain more bold or free expressions with regard to the vices of the Pope, and his extortions:

“Rome nous succe, et nous transglouft

“Rome trait et destruit tout,

“Dont sourdent tous li mauvais vices [g].”

C A P. XXXVII.

[IN *cujus rei testimonium, etc.*] Such a number of witnesses being found inconvenient in attestation, Mabillon says [b], “Lapso
“tempore, inventa est ab Anglicanis regibus compendiosior via,
“ut non aliis testibus, quam teste rege ipso uterentur; hujusce
“ritus originem Richardo Primo antiquiorem esse non puto,
“cujus complures literæ sub hac forma reperiuntur.” This might not be thought, however, an attestation of sufficient solemnity to the Great Charter, though Richard might have confirmed instruments of less consequence in that more compendious manner.

[e] Pasquier indeed informs us, that it was only finished by Jehan Mehun, but was begun forty years before by Guillaume de Lorris. See *Recherches de la France*, p. 602. The *Naudæana* supposes, that Jehan de Mehun went likewise by the names of Clopinel, and de Lorris, p. 212.

[f] *Annales d'Acquytayne*, Paris, 1537.

[g]. *Recherches de la France*, p. 238.

[b] *De Re Dipl.* p. 160. *Erasmus* gives us likewise the reason for the kings of England, and other parts of Europe, using the plural *nos* in all instruments, which he apprehends to have been originally designed to communicate part of the merit to the council who gave their advice. *Erasmii Opera*, Basileæ, 1540. p. 315.

SOME

SOME ordinances of different countries in Europe have been mentioned in the preceding notes and comment upon Magna Charta. In order not to swell these observations unnecessarily, on particular articles, I have thought it more proper to reserve for the conclusion some laws of the French parliament, whilst it continued to have that freedom which Boulainvilliers hath so clearly proved it was anciently possessed of, at the same time that he pathetically laments, his countrymen had not the same spirit in preserving their just rights, as our ancestors have so nobly exerted. And I shall first give the introduction to an ordinance of Lewis the Eighth, in the year 1223, from which it will appear, that the French parliament at that time was constituted nearly in the same manner with that of England.

“ Louis, &c. Sçachez que par la volonté et consentement *des*
 “ *Archevêques, Evêques, Comtes, Barons, et Chevaliers du Roy-*
 “ *aume de France,* Nous avons fait établissement sur les Juifs.
 “ Remarquez que voici une constitution generale, etablie, non
 “ par la volonté absolue du Roi, mais distinctement par celle des
 “ Comtes, Barons, et Chevalerie du Royaume [i].”

In the following reign of Philippe le Bel, many of the provinces of France, and among the rest that of Normandy, obtained likewise concessions from the king, which may be properly styled *Chartæ Libertatum*; and one of them indeed Boulainvilliers expressly calls the French *Magna Charta*. In the Norman charter, if I may so call it, there are two points insisted upon by the subjects, and allowed by the king, which exactly agree in substance, as well as expression, with the twenty-ninth chapter of Magna Charta, viz. that all nobles shall be tried *par leurs Pairs* (*per pares*); and that all causes shall be determined *par la loy du Pays* (*per legem Terræ*). These laws, as they are made so very near the time of our Magna Charta, and by the same persons, viz. the powerful nobles and barons in both king-

[i] Boulainvilliers, *Etat de la France*, vol. iii. p. 56.

doms, seem to be expository of each other; I should therefore conceive, that the trial *per Pares*, in the twenty-ninth chapter of Magna Charta, was meant chiefly to relate to that of the Barons by their *Peers*, though the words used are so general: and to this day we hold, that a Lord of parliament is entitled to such privilege, though a commoner is not to be tried by the Members of the Lower House. It seems very extraordinary however, that we have not, after this twenty-ninth article of Magna Charta, more frequent accounts, in the early part of the English history, of Peers being tried either by their own body, or a jury. The earl of Gloucester was executed, in the time of Edward the Second, without any such regular trial [k]; as were also the Lords Hastings and Ryvers, in the short reign of Edward the Fifth.

It must be said, to the honour of the French barons, that there are in their charters some most material provisions, in favour of

[k] Brady, vol. iii. p. 160. Notwithstanding this twenty-ninth article of Magna charta was perhaps chiefly intended to prevent the undue influence of the crown in the prosecution of a peer, it turned out afterwards to be the great cause of their oppression; as before the statute of William the Third, which directs *all the Peers* to be summoned, a peer of England was the only subject of this country who had not a fair and indifferent trial. In the year 1673, a bill was proposed in the House of Lords, that there should be at least twenty-five peers present. Anchitell Grey's Deb. vol. i. p. 126. 189. vol. ii. p. 447, et seq. This act was however opposed in the House of Commons, from a low jealousy, as it should seem, of not communicating in some measure to the peers the same fair trial, which they themselves were entitled to.

It seems to be a very extraordinary construction of the statute of William the Third, which is rather insinuated than contended for by Mr. Justice Foster, in his Treatise on Treason, that the Spiritual Lords need not be summoned under the words *all who have a right to sit and vote* in parliament; which I apprehend to have meant only the making it unnecessary to summon peers who were minors, or professed papists. As for the bishops usually requesting to retire before the condemnation, or acquittal, I have endeavoured, in the comment on the 27 Edw. I, to account for the reason of that *Canon's* being established at the council of Toledo.

liberty

liberty and the rights of the subject, which are not to be found in Magna Charta. They particularly abolished torture, though the practice may have since prevailed in France [1]; and likewise expressly stipulated, that no money should be raised for the king without the express consent *des trois Etats* [m]: of which most

[1] It will be proved in some observations on 3 Edw. I. cap. xii. that torture was formerly used in England.

[m] The article of Magna Charta, which relates to Escuage, was not sufficiently express with regard to this great constitutional point; otherwise the statute of 25 Ed. I. would not have been necessary, which, in many respects, likewise goes further, and is much more explicit.

That no money could be raised anciently in France without the consent of the Three States, is most clearly proved by the testimony of Fortescue. "And how so be it, that the French King reynithe upon his people *dominio Regali*, yet Saynte Lewes sumetyme Kinge of France, ne any of his progenitours, set never talys or other imposicions without the assent of the three estatts, which whan they be assembled, are like to the Court of Parlement in Englonde. And this order kept many of his successours, untill late days, that Englishmen made such a war in Fraunce, that the three estatts durst not come togeders. And then for necessity the Kynge took upon him to set talys upon the Commons without the assent of the three estatts; but yet he would not set any such charges upon the nobles, for feare of rebellion." Fortescue on Lim. Mon. p. 15. It may not be improper here to observe, that no proof can be more irrefragable than the citation from this author, as he was a considerable time in France whilst he attended upon the Prince of Wales, son of Henry the Sixth, and at the very period when requiring the assent of the three constituent parts of the French legislature was first refused. There is, in Mr. Petyt's collection of Manuscripts likewise, a treaty of peace made between Henry the Seventh (in the eleventh year of his reign) and the king of France, which is expressly recited to have been made, *per tres status utriusque Regnorum Angliæ et Franciæ ritè convocatos*, viz.

1° *Per Prælatos et Clericos.*

2° *Nobiles.*

3° *Et Communitatem in Parlamento*; which shews, that the French parliament was summoned occasionally, even after Fortescue's time, accord-

most essential right we have no fully declaratory statute till the 25 Edw. I. cap. v.

ing to their ancient usage. Petyt Mss. vol. vi. p. 101. *Becmanus*, in his description of France, says, that the third component part of these states consisted of, "Magistratibus (quos subalternos vocant) et minore populo." For the method of summoning and proceeding in the French parliament, at least the usage in the last century, see Sir Robert Filmer's Pref. to the *Freeholder's Grand Inquest*.

CHARTA

CHARTA FORESTÆ.

THE Charter of Forests, in all editions of the Statutes, immediately follows the Great Charter, though by the preamble it appears to be a statute of Edward the First, reciting the Charter of Henry the Third, his father, by *Inspeximus*, and re-enacting it [a]. From the alteration between the circumstances of the present times, and those when this law first took place, it does not seem to contain any point of great constitutional importance, though, by being joined to Magna Charta, they are generally styled *Charta Libertatum*.

A king of England could not formerly amuse himself in his library, or by encouraging the more elegant arts; and from the dignity of his station he could not fill up his time by intermixing with common society. It was therefore necessary for him to move from one place to another, and at each of his palaces to have a vast forest surrounding it for the purpose of hunting, whilst at the same time a large tract of uncultivated desert was supposed to contribute to magnificence. This extent of forest, always imagined by a hunter, even if not a king, to be too contracted —

Ut brevibus clausus Gyaris, parvâque Seripho,
naturally produced oppression on those whose property unfortunately happened to border on such a district [b]; and Sir Robert Cotton

[a] The same observation hath been already made with regard to *Magna Charta*. The original charter of the forest and all authentic records of it are lost. Blackstone's Gr. Ch. p. lxx.

[b] The great attention of the kings of France also about this time to the preservation of the deer in their forests, appears by a record of a grant mentioned by Mabillon, in his treatise *De Re Diplomaticâ*, p. 611.

Cotton [c] mentions, that Robert de Parnslow, in the reign of Henry the Third, had procured large sums of money [d], under pretence of encroachments and affarts [e]. The first article therefore of this charter of the forests reducing them, by the view of a jury of ambulators, to their limits in the time of Henry the Second, was certainly a point of no inconsiderable importance: especially when we find, by the tenth chapter of this charter, that the killing of the king's deer was, before that, punished with the loss of life or limb, at the same time that a murderer only payed his weregild, or was entitled to his benefit of clergy.

CAP. IX.

UNUSQUISQUE liber homo agistet boscum suum in forestâ pro voluntate suâ, et habeat pannagium suum. Concedimus etiam quod unusquisque liber homo possit ducere porcos suos per dominicum boscum nostrum liberè, et sine impedimento ad agistandum eos in boscis suis propriis — et si porci alicujus liberi hominis unâ nocte pernoctaverint in forestâ nostrâ, non aliquid de suo perdat.] It appears from this chapter, that pasnage (or pawnage, as it is improperly spelt

“ Concessimus Oatlando abbati, et monachis ex monasterio Sitthin, quod liberè possint venari, unde fratres consolationem habeant, tam ad volumina librorum contegenda, quam ad manicas et zonas faciendas, salvis tamen forestis nostris.”

[c] In his Posthuma. Mr. Petyt calls this a *fictional work*. Petyt Mss. vol. H. p. 281. It contains however some valuable and curious particulars. *Pannage* is sometimes termed *peffona* in old records: “ De waldis ut possint arare, et seminare (tempore *peffonæ*) sine damno Archiepiscopi.” Dr. Harris's Kent, vol. i. p. 348. This word must be derived from the French *païson*, because acorns were the chief food of hogs.

[d] “ Quod enim de forestis solvitur pene totum *ex placitis* et *exactionibus* provenit: placita autem dicuntur *pœnæ pecuniariæ*.” Dial. de Scacc. l. ii. c. 11. et 12.

[e] *Affarts* are places where the wood hath been grubbed up, “ ils coupent et *effertent* du bois.” Lery's Voyage to Brazile.

in

in the translation of the Statutes) was considered as being of great profit to those who lived in the neighbourhood of a forest, for the feeding of swine, though at present it is little attended to. The people of this country, in the winter, chiefly subsisted upon salted meat, even in the castles of the great men and barons; and we therefore find in Domesday, that it is generally stated for how many hogs the estate hath mast or pannage; and the author of Fleta hath a whole chapter *de custodia porcorum*; in the collection of the Salic laws, the second title is likewise *de furtis porcorum* [f]. This animal, notwithstanding its great use, is now considered as so contemptible, that the ridicule, in some measure, is extended to those who have the care of them; yet, in the time of Homer, Eumæus is styled the $\Delta\iota\omicron\varsigma$ $\psi\phi\omicron\pi\epsilon\omicron\varsigma$, and is one of the most considerable persons in the island of Ithaca. In later ages, the famous Pope *Sextus Quintus* is said to have originally followed the same occupation. The Saxon Chronicle, A. 1131, states, that there was then such a mortality amongst these animals, that they who kept two or three hundred did not perhaps save one out of such a number, and Elfhelm by his will directs, that two hundred hogs shall be fattened for his wife, wherevershe shall choose [g].

C A P. XI.

QUICUNQUE Archiepiscopus, Episcopus, Comes, vel Baro, veniens ad nos ad mandatum nostrum, transferit per Forestam nostram, liceat ei capere unam bestiam vel duas per visum Forestarii, si presens fuerit; sin autem, faciat cornari, ne videatur furtivè hoc facere: idem liceat eis in redeundo.] This privilege of killing a deer or

[f] Schilteri Thes. Antiq. Teuton. vol. ii. Ulmæ, 1727. Camden takes notice, that swine-herds were not uncommon in Bedfordshire in his time. Brit. vol. i. p. xxi.

[g] Now first published at the end of Lye's Anglo-Saxon Dictionary.

two is confined to an Archbishop, Bishop [b], Earl, or Baron, which possibly many of those, who are still entitled to it under this statute, may not be acquainted with. The indulgence indeed is not granted in the most polite manner, as the statute enjoins such respectable personages summoned by the king, [*ad mandatum nostrum*] [i], to give notice by blowing a horn, *ne videatur furtivè hoc facere*. It may likewise be inferred, from this privilege being confined to barons and superior degrees of nobility, that the members of the House of Commons could not be considered as of much importance. When the crown at present gives any small favours, as places for public fireworks, or medals upon a coronation, the members of the lower house are not forgotten.

C A P. XII. & XIII.

UNUSQUISQUE liber homo de cætero sine occasione [k], faciat in bosco suo, vel in terra sua, marleram—et habeat in boscis suis aërias

[b] Prynne, in his Collection of Records, hath often occasion to observe upon the great esteem that venison was held in by the bishops and abbots of those times. The archbishop of Canterbury, *who loved venison more than his sovereign's or people's souls*, claimed *thirteen bucks*, vol. iii. p. 267. And afterwards, how *well the bishops loved venison and hunting in those days*, will appear by another record, &c.

[i] In Fourth Inst. p. 308, these words, *ad mandatum nostrum*, are expounded to extend to a nobleman's coming to parliament.

[k] The word *occasione* is translated in all the editions of our statutes, and even in Mr. Ruffhead's, who hath rectified some mistakes of this kind, by the word *danger* *. Du Cange, however, makes the signification

* I must admit, that I find, in a Glossary of old French words added to Carpentier's late Supplement to Du Cange, that there was an ancient officer in France, who was styled *Sergent Dangereux*, and described to be "celuy qui veille aux delits de camps, ou de forets, et sur tout au droit du Roi dans les bois appellé *Dangier*;" and in the same sense the gardiner, in the old Romance of the Rose, who upon all occasions prevents the lover's plucking it, is called *Dangier*. "In filvis custoditis, c'est a dire bois mises *en danger*." Fauchet's Antiquités Gauloises.

aërias accipitrum, esparvariorum, falconum, aquilarum, et heironum: similiter mel quod inventum fuerit in boscis suis.] This statute passed in the year 1225; and the privilege of sinking a marl-pit is a proof of an early attention and knowledge in the improvement of land. I must own that I was astonished lately to observe, that the use of marl in husbandry was known to the ancient inhabitants of this island before the time of Pliny [1]: “Alia est ratio, quam Britannia et Gallia invenere alendi eam (sc. terram) ipsâ; quod genus *margam* [m] vocant.” We find that, in the *Statutum Walliæ* (12 Edw. I.) it is one of the instructions to the sheriff, and coroner, to inquire *de fossatis et marleris levatis juxta iter publicum*; which shews, that this kind of manure was very commonly used. When a marl-pit was sunk in ground that did not belong to the king, but which happened to be in the purlieu or neighbourhood of a forest, prosecutions were instituted in the Forest courts, which imposed heavy fines for of it to be a fine or tribute, citing Rodéricus Tolet. in Hist. Arabum, “*Fiscum diversis occasionibus augmentavit*,” and likewise from the same author, *remota omni occasione regali, et papali*.” It should therefore perhaps be more properly translated, every man may sink a marl-pit in his own ground without being fined. I take the verb *occasionor*, formed from this substantive, to be used in the same sense in the ninth chapter of this law, “*non inde occasionetur, unde aliquid de suo perdat*”; and Du Cange also says, that the signification of that verb is, *præstationibus gravare*. Possibly it may be unexceptionably rendered by the word *trouble*, which will include a fine, as well as any other punishment or prosecution. Thus the title of 7 Edw. II. is, “*ne quis occasionetur pro morte Petri de Gaveston*.”

[1] There is also a proof of attention to an article of husbandry when Fleta wrote, which is too much neglected in more modern days. “Prospiciat Ballivus quod cardui et cæteræ herbæ damnosæ abolentur post festum Sancti Johannis.” L. ii. c. 81.

[m] L. xvii. c. vi. ed Franefort, 1582. I should think Pliny mistook this word, as pronounced by some Roman who had been in England, and that it was really *marla*, from whence our word *marl*.

the offence, as the pit occasioned both inconvenience and danger to the hunter.

From the provision with regard to falcons, &c. it should seem the king claimed them, wherever found, as royal birds. It is well known, that falconry, together with hunting, was the principal amusement of the great barons, and consequently that hawks were very valuable. It was indeed so expensive, and required so many attendants, that few could afford such an establishment [n]; but they, who did not themselves keep falcons, were frequently obliged, by the grants of their lands, to procure them annually for those under whom they held their estates. Littleton, in his treatise upon Tenants in Common, put the instance of two such tenants granting a lease of land, upon condition of furnishing every year a falcon; and he determines very seriously, that they shall have but one assise for it, *car homme ne doit faire un pleint en assise de la moitié d'un esperver*. Now cases are generally put by lawyers, which most commonly happen in the times they live in [o]; and it

[n] From the expence which attended the keeping falcons, they are always represented on the hands of Princes and their descendants. See Montfaucon's Explanation of some of the ancient French Monuments, vol. i. p. 373, & seq. In the famous tapestry of the cathedral church of Bayeux in Normandy, Harold sets out on the message of Edward the Confessor to William Duke of Normandy with a hawk on his wrist. When he is afterwards taken prisoner, the captor Guy, Count of Ponthieu, precedes him with such a bird on his hand; and Harold follows with a dejected air, but still permitted to carry his falcon. In the fifty-fifth Plate of Montfaucon, there is likewise a representation of the two sons of William the Conqueror, with this bird on their hand; as also of queens and princes in the same attitude. See Montf. t. iii. pl. 4.

[o] "Itaque in querelâ damni dati, *Tu occidisti hominem, vel damnum dedisti cum cane et falcone*, frequens enim et vulgare fuisse videtur, de quo leges præcipiunt." Stiernhook, De jure Sueonum vetusto, l. ii. c. viii.

need not be said, that such a case could not at present be mentioned without ridicule.

The express privilege insisted upon, with regard to every man's being entitled to the honey which he finds on his own ground, may in more modern times appear singular, when perhaps there hath been no law-suit, or question, about this sweetening ingredient, for the last three hundred years; before the plantations of sugar, however, in the West-Indies, it must necessarily have been in much greater request, and borne a higher price. The wax likewise must have been of considerable value, as the manufacture of tallow-candles is not very ancient. There is also a statute of Henry the Sixth with regard to wax-chandlers, the preamble to which sets forth, that wax was used in great quantities, not only for the purpose of making candles, but likewise images of saints [p]. Besides this, mead was now the liquor of luxury, and still continues in great request throughout Wales [q]. Thus Drayton, in his Polyolbion, speaking of the principality, says,

“Fill me a bowl of *meath*, my working spirit to raise.”

Hence the first discovery of the use of honey is attributed to Bacchus, it being a *succedaneum* for wine:

“Liba Deo sunt; succis quia dulcibus ille

“Gaudet, et a Baccho mella reperta ferunt [r].”

[p] The wax-chandlers are observed by Stowe to have been a very ancient fraternity: they were incorporated A. D. 1414. The tallow-chandlers in the second year of Edw. IV. b. v. p. 209. ed. 1720. I am informed, by an ingenious correspondent to whom I have not only this obligation, that he had once a living by the endowment of which the vicar was entitled to all the wax offered at the three great feasts.

[q] In the year 1742, the gentry of Monmouthshire and Radnorshire gave a magnificent entertainment to the then Prince of Wales at Ragland and Radnor castles. At the latter feast, metheglin was handed round in large goblets to the courtiers, who attended the prince in his progress. See an account of this, as also a speech made by Sir Hugh Vaughan, together with the Prince's answer, printed in that year.

[r] Ovid. Fast. l. iii. 735.

The same God is said, by Diodorus Siculus, to have been the inventor of *beer* for the use of the northern countries, where there were no vines [r]; and Plutarch, in his *Symposiasts*, observes, that all nations who have not wine, use instead of it *μελε/ειον*, which must be supposed to be a kind of mead; it is therefore much prized in the northern parts of Europe, where bees make a principal head both of the Danish and Swedish [s] codes even to this day. Honey is likewise a considerable object of the ancient French ordinances, under the title *Aboilage*, and together with wax is frequently mentioned in the laws of Hoel Dda; where the perquisite of the king's great chamberlain to as much wax as he can bite off the end of a candle is particularly recognized [t].

C A P. XVI.

PLACITA de Forestâ, sive de viridi, presententur capitali Forestario nostro, cum in illas partes venerit ad tenendum placita de Forestâ.] They who may have a curiosity to see the method of

[r] L. iv. c. ii.

[s] Qui alvearium domesticum apium infra septa alterius furaverit, "capite puniatur." Themis Romano-Suecica, Gryphiswaldiæ, p. 53. Honey is also a considerable article of rent in Poland. Chappe D'Au-terroche, vol. i. p. 13. It was an ancient custom, therefore, to fasten the thief to the tree from which he had stolen it. The Baron de Mayerberg, who travelled in Muscovy during the year 1661, likewise informs us, that trees are there prepared to receive bees, which those even who fell their own wood are enjoined under penalties to take down in such a manner, as not to prevent their neighbours procuring the honey from the trees which they may have thus prepared. See the Baron's Travels, p. 223.

[t] It is one of Lewellin's complaints to Edward the First, "Quod Justiciarius Cestriensis namium recepit tale, viz. quindecim libratis mellis ex bonis ipsius principis." Appendix to Wynne's History of Wales, p. 270. And to this day there is an annual fair at Conway, in Carnarvonshire, which is called *The Honey Fair*. There is also a *Honey Lane* in Cheap Ward.

proceed-

proceeding before the justice in eyre may consult Dr. Brady's Appendix to his History; and likewise a record now first printed in Mr. Blackstone's Introduction to the *Charters*. There is also amongst Mr. Petyt's manuscripts, in the library of the Inner Temple, a very regular journal (probably by one of the counsel who attended) of the proceedings before Lord Holland, which court was held at Gloucester, for the Forest of Dean, on the 10th of July, 1634. Two indictments were preferred at this eyre against the assignees of the earl of Pembroke and Sir John Winter. The charges in both these prosecutions were proved, and the Swainmote jury found in the first, that they had unjustifiably sold 178,000 chords of wood, at 6s. 8d. per chord, to the value of 59,400*l.* and in the second 60,700 chords, amounting to 20,050*l.* [u]. The last instance of the justice in eyre's having held a court in any of the Forests, is believed to have been during the reign of Charles the Second. This is mentioned by Mr. Roger North, in his Life of the Lord Keeper, and he himself attended as King's counsel: it hath since been dropped, though not perhaps without its use, from the great expence to the crown.

[u] Petyt Mss. N^o 35. p. 37, & seq.

STATUTUM HIBERNIÆ DE COHEREDIBUS,

14 Hen. III. A. D. 1229.

THIS *Statutum Hiberniæ* follows the two Great Charters in all editions of the Statutes. Mr. Cay very properly observes, that it is not an act of parliament, and cites the old abridgement, title *Homage*: he allows it a place however in his collection of the Statutes, not to differ from former editors. This, in some measure, gives the authority of legislation to the king's law-printers; and yet, if such an ordinance is inserted in every edition of the Statutes, for near three centuries together, by printers who have obtained the king's patent, whilst the parliament permits this for such a length of time, it becomes a question of some difficulty to say what force such laws may have acquired [w]. No such question fortunately can ever arise upon this statute, as it is merely a *rescriptum principis* to certain *milites* (adventurers probably in the conquest of Ireland, or their descendants), who had doubts *with regard to the tenure of lands holden by Knight's service, and descending to coparceners within age* [x]. The king informs the justiciary of Ireland what is the law and custom in England with regard to this; and I cannot

[w] This is a very strong reason, among others, given in the Appendix, from a proper revision of our code of statutes. Mr. Blackstone hath observed, that there is a mistake of ten years in the old editions of the Statutes, in a limitation of time by the 32 Hen. VIII. cap. ii. which should be *fifty* years, instead of *forty*. Vol. iii. p. 189.

[x] Littleton, in his chapter of *Parceners*, takes no notice of the doubt in this statute, which he must necessarily have done, if this ordinance was considered as a law in the time of Edward the Fourth. As he lived however before the invention, or at least in the very dawn, of printing, possibly the greatest lawyers had only a collection of those statutes which were most frequently in use.

say that he does it in the most precise and intelligible manner. There is a passage however at the latter end of the answer, which is too singular to be omitted, “et si primogenita sit heres
 “omnium aliarum sororum suarum, vel puerorum suorum, si
 “obierint sine herede de seipsis, posset habere custodiam suarum
 “sororum; *sed hoc esset quasi committere lupum agno devorandum.*”
 There is the same jealousy in many other countries, that the person who is to get any thing by the death of the orphan shall not have the nurture of him. Thus, by a law of Solon, mentioned by Diogenes Laertius, μηδ' ἐπιτροπεύειν εἰς ὃν ἡ υἱία ἐρχέται, τῶν ὀρφανῶν τελευτήσαντων; and Pufendorff takes notice, that, amongst the Jews, the son for the same reason was not permitted to extract a thorn from his father's foot.

All the editions of the Statutes have marked this ordinance as *obsolete*, which introduces another question of great importance, whether any statute can become so, or any way lose its force, but by actual repeal. No English lawyer hath ever advanced such a doctrine, though by the law of Scotland a statute is said to lose its force by *desuetude* [y], if it hath not been put in execution for sixty years [z]; and a distinction is made between statutes which are as it were *half obsolete*, and those in *viridi observantia*.

[y] Stair, Macdoual, Wallace.

[z] *Some Scotch lawyers have extended this to a century.* It appears by the 13 Ed. I. cap. vi. entitled, *Forma exemplificationis Chartarum*, that it was then supposed that the articles in some charters might be obsolete; and the Treasurer and Barons of the Exchequer, together with the Judges of both benches, are ordered to inquire *de usu articuli, vel articulorum, et si plenè fuerit usitatus.*

PROVISIONES DE MERTON,

20 Hen. III. A. D. 1253.

THIS law [a], as well as many others in this century, seems to be only an ordinance; the difference between an ordinance and statute (according to Sir Edward Coke) consisting in this, that the ordinance wants the consent of one component part of the legislature, which is, in all instances, *that of the Commons* [b]. It hath however been long considered as an act of parliament, and improvements of waste grounds by inclosing are not unfrequently made under the fourth chapter of it.

It is called the Statute of Merton, from the parliament, or rather council, sitting at the Priory of Merton, in Surrey, which belonged to Regular Canons, according to Dugdale. Though some of the abbies might have had very large and spacious houses, yet it is not probable that there could have been accommodation [c] for what is now called a Parliament, with the inter-

[a] This statute is inserted in the Annal. Monast. Burton. Gale, vol. i. p. 287.

[b] Elsyng states the distinction thus: "What begun in the Commons was only termed a petition (for they had no power to *ordain*); and what begun in the Lords was styled an ordinance. *Actus Parliamenti* was an act made by the Lords and Commons; and it became *Statutum* when it received the King's consent." Upon examining the late accurate edition of Elsyng, 1768, 12^{mo}, I find this passage is omitted, and am informed, that he had erased it in the MS. from which that edition is printed.

[c] In all the ancient palaces of the kings of England, there was a large room, or hall, for the accommodation of what was then called a Parliament, which went by the name of the Parliament Chamber. There is such

intervention of the Commons; and it should seem, from Dugdale's short account of this Priory, that it was by no means largely endowed.

This statute, in its different chapters, contains many wise regulations. The kingdom was at peace, and the king had the spirit to refuse his assent to a very tyrannical request of the barons, that, if any offence was committed in their parks or ponds [d], the offender was to be sent to their *own prisons*, and tried,

such a hall, now converted into a barn, at Eltham, in Kent, which is said to have been a palace of King John, though it is now considered by eminent antiquaries as being of a later date; and I have little doubt but that Westminster-Hall was built for the same purpose. There is likewise such a room in the old palaces of the kings of Scotland; particularly at Linlithgow, and Sterling.

[d] See the last chapter of the statute. The word in the original is *vivarium*, which I have rendered a *pond*, agreeable to the common translation of the statutes. It is very true, that the classical signification of the word is often *pond* or *flew*:

fugitivum dicere piscem,

Depastumque diu vivaria Caesaris. Juvenal.

But the Latin of the Glossaries must fix the signification of a term in an ancient statute.

Qui à rudiori ævo expectat elegantias, optat ille,

"Voce ut loquatur psittacus coturnicis."

Marsham, in Propyl. Mon. Angl.

Spelman says, "*parci et warennæ nostræ sub vivariorum appellatione sæpe veniunt;*" and to confirm this sense of the word, *carp*, which is the most valuable pond-fish, is supposed not to have been known in England at this time. Thus Chaucer, in speaking of a gentleman's *flew* which was well stocked, says,

"And many a breme, and many a luce in flew."

Leonard Mascall, of Plumsted, in Surrey, published a treatise on fishing, fowling, and planting, in which he asserts, that he first introduced into England *carp* and the *pippen* apple, A. D. 1514; see Fuller's Worthies, part iii. p. 113. It should therefore be translated *warren*, and not *pond*;

warren,

tried, undoubtedly, in their own courts; when therefore, in the year 1329, a statute was made, entitled, *De Malefactoribus in Parcis*, this oppressive clause is omitted, though in other respects the punishment of such offenders is very severe. One of the old Chronicles says, that the barons, after they had carried their points by the provisions in Magna Charta, “*evaserunt totidem tyranni;*” and as the commons could not at this time resist their oppression, the only altar of refuge was in the crown.

C A P. IV.

I T E M quia multi magnates Anglie, qui seoffaverunt milites et alios libere tenentes suos de parvis tenementis in magnis maneriis suis, questi fuerunt, quod commodum suum facere non potuerunt de residuo maneriorum suorum, sicut de vastis, boscis, et pasturis communibus, cum ipsi seoffati habeant sufficientem pasturam, quantum pertinet ad tenementa sua, &c.] There is a reading of Fitzherbert (who was a Judge of the Common Pleas in the reign of Henry the Eighth) upon the statute of 4 Edw. I. entitled, *Extenta Manerii*, in which he hath occasion to explain what shall be deemed *sufficient common of pasture*, and gives his comment upon it in these words: “*It is necessary to knowen what is sufficient common of pasture, and that me seemeth by reason should be thus, to se how mucche cattel the hay and the strawe that a husbandman getteth upon his own tenements will find sufficiently in winter, if they lye in the house, and be kept therewith all the winter season; for so much cattel should he have common in summer, and that is sufficient [e]*” As improvements are sometimes, even now, made under

warren, from the old French word *garrenne*, signifying a tract of ground in which the lord had a right *garrenner*, or to forbid others killing the game. “*On ne peut tenir riviere en garenne, ou defense.*” Inst. Cout. l. x. 2. 10.

[e] “So on the contrary some think a yard-land, which varies in quantity, is as much arable as was suited to the stock of cattle a man’s
“yard

under this statute, though the facility of procuring private acts of parliament for the same purpose makes it every day less frequent, and the great question on these occasions is, *whether sufficient common is left*, I thought it might not be improper to give the construction of this father of English husbandry upon these words of the statute. This reading of Fitzherbert's is entitled *Surveyenge*, and is printed by Berthelet in 1539; it hath lately received a new edition under the inspection of a learned antiquary, together with some other tracts by the same author.

C A P. XXII.

SIMILITER provisum est, et a domino rege concessum, quod de cetero non current usure contra aliquem infra etatem existentem.] The effects and debts of an usurer were anciently forfeited to the king, as appears by many records in Prynne's Collection. The Romans punished usury with more severity than they did theft. "Est interdum præstare populo mercaturis rem
"quærere ni tam periculosum fiet; et item fœnarari si tam
"honestum et. Majores enim nostri sic habuere, et ita in
"legibus posuere, fuerem dupli condemnari, fœneratorem qua-
"drupli [*f*]." Tacitus says, that, amongst the Germans,
"fœnus agitare ignotum, ideoque magis servatur, quam si ve-
"titum esset." The true reason probably for its not prevailing amongst them, or our ancestors, was, that they had little or no personal property; land-owners have also always been envious of the sudden fortunes raised by commerce, and the increase of personal estates. Treatise may be written on treatise, to prove that these two interests mutually support and strengthen each other; the prejudice may indeed be somewhat lessened, but

"yard could maintain in winter, and this accounts for its varying even
"in the same field."

[*f*] Cato de Re Rusticâ in Proœm.

H

cannot

cannot be eradicated. The statute of 21 Jam. I. cap. xvii. concludes by declaring, "*that nothing therein contained shall be construed or expounded to allow the practice of usury, either in point of religion or conscience.*" Sir Edward Fines (afterwards Lord Clinton) opposed a bill, which was drawn by Judge Brook, and moved in the House of Lords, by saying, "Shew me a state without usury, and I will shew you a state without men and trade [g]."

C A P. IX.

Et rogaverunt omnes episcopi magnates, ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, que hucusque usitate sunt et approbatæ.] Selden says [b], that Robert Grossetest, bishop of Lincoln, wrote about this time a treatise to prove the necessity of introducing this part of the Civil and Ecclesiastical law into this country [i]; Sir Edward Coke [k] also mentions, that William de la Pole, duke of Suffolk, attempted a more extensive innovation of the same kind in the reign of Henry the Sixth, which occasioned Fortescue's treatise *De laudibus legum*

[g] Lloyd's Worthies, p. 1670, and Harl. Misc. iv. N° 294.

[b] Differtatio ad Fletam. Grossetest likewise insisted, that such bastards had been legitimated by the law of England: "et, ut seniorum relatione didici, consuetudo etiam in hoc regno antiquitus obtenta et approbata tales legitimos habuit et hæredes, unde in signum legitimisationis nati ante matrimonium consuêrunt poni sub pallio super parentes eorum extento in matrimonii solemnizatione." Ibid. p. 538.

[i] Selden likewise mentions in the same dissertation, that, notwithstanding this unanimous dissent of the barons, in another reign the children of John of Gaunt, by his wife Catharine *before marriage*, were made legitimate by act of parliament.

[k] 3d Inst. p. 208.

Angliæ

Angliæ [1]. It was one of the articles of impeachment against Cardinal Wolsey, "quod ipse intendebat finaliter antiquissimas
"Anglicanas leges penitus subvertere, et hoc regnum Angliæ,
"et ejusdem regni populum, dictis legibus civilibus et canoni-
"bus subjugare."

Beaumont, who was the son of a judge, and educated in the Temple, seems to allude, in one of his plays, to *this well known protest*, arising from the disagreement between the Civil and English law on this head:

"The Children thou shalt get on this Civilian,

"Cannot inherit by the law."

Notwithstanding the opposition to the introducing this part of the Canon law to legitimate the children of those who married after living in a state of fornication, which seems to be a very humane provision in favour of the innocent, it by no means prevails to the full extent, in those countries which are supposed to have adopted the Civil law. For example, by the ancient laws of Spain the legitimation of the children, by a subsequent marriage, is confined to the case of a bachelor marrying a spinster, *Si ome soltero con muger soltera fiziere fijos, e despue casare non ella, estos fijos sean herederos* [m].

The Commons, in the 46th year of Edward the Third, did not adhere so tenaciously to another fundamental rule of the law of England, as they petitioned that the half-blood might inherit [n].

[1] The author, who speaks the most disrespectfully of the common law of England, is a French writer, "Leges Angliæ plenæ sunt tricarum, "ambiguitatumque, et sibi contrariæ. Fuerunt siquidem excogitatæ "atque sancitæ a Normannis, quibus nulla gens magis litigiosa, atque in "controversiis machinandis et proferendis fallacior reperiri potest." Philip. Honor.

[m] *Fuer Real de Espan.* p. 134. printed at Salamanca, 1569.

[n] See Petitions in Parl. vol. ii. p. 314.

ASSISA PANIS ET CEREVISÆ [o].

51 Hen. III. A. D. 1266.

THE parliament or council upon this occasion was held at Winchester, *quò vocati sunt omnes magnates terræ*; and, what is more extraordinary, “omnes uxores comitum et baronum, et militum in bello occisorum, vel captivorum in bello existentium [p].” I shall consider this as being part of another statute made the same year (which is entitled, *Judicium Pillorie*, being the punishment of a baker, who shall offend against that law), notwithstanding four other acts of parliament relative to very different matter intervene.

The author of Fleta hath made these regulations part of his work, without taking notice that they arise from any authority of the legislature, and, with regard to the measures of those times, they who have curiosity on this head, may consult the twelfth chapter of the second Book; as likewise similar provisions in France, by King John, contemporary with Edward the Third [q].

The present statute recites the king's *Inspeximus* of certain ordinances of *Affise*, made in the time of his progenitors, and it is observable, that those who supply the people with their necessary food or drink (as bakers, millers, and brewers,)

[o] This *Affisa Panis et Cerevisæ* is to be found in Matthew Paris, with some additions. King John, in the fifth year of his reign (whilst he was in France), made a regulation with regard to the price of bread as it was to be sold in the city of Winchester. Two sorts are mentioned, the *white* and the *black*, which latter probably resembled the German *bumpernacle*. Petyt Mss. vol. i. p. 102.

[p] Annal. Waverl. Gale, vol. iii. p. 220.

[q] Ord. Royal. p. 5, & seq.

have

Have not only always been suspected more than other traders of impositions [r], but have likewise been subject to regulations of particular severity. This is not confined to Europe; for the late treatise on the manners of the Turks [s] informs us, that it is very common to rub against the body of a baker who hath been hung up at his own door in Constantinople, for selling bread under weight, and that these very frequent executions cannot put a stop to the practice of this knavery. It might perhaps be going too far in asserting, that all interpositions of the legislature, in matters of this sort, are rather prejudicial to the publick, than beneficial; it may however be said, that much judgment and caution should be used by the magistrate who carries them into execution.

One reason for the frequent complaints against bakers in these times arose from lords of manors having special grants of the fines, to be imposed for breaches of the assise. Thus we find in the claim of Gilbert de Gaunt in Swaldale, which was opposed by the Attorney General: "Et Rogerus Hengham qui sequitur pro domino rege petit quod inquiretur si unquam fuit in seisinâ de emendâ assisæ panis et cerevisiæ fract' in Rythe, quia dicitur quod non est aliquis pistor in prædicta villa de Rythe [t]." The same jurisdiction was given to the Abbot of Croyland [u].

[r] Thus Chaucer says of a miller,

"Well couth he steale corne, and tolle thrys."

And in another place,

"For whiche this miller stole both whete and corne,

"An hundred times more than befor."

[s] Printed for *Nourse*, 1768, 2 vols. 12^m. See also Lucas's *Voyages*, who was witness of four bakers being executed for this offence at Grand Cairo.

[t] Regist. Hon de Richmond, p. 91.

[u] Gale, vol. i. 520. "Cum enim Abbas de Croyland obtinent in Whaplode principale dominium, et assisæ panis et cerevisiæ correctionem."

I shall not enter into the *minutiæ* of the regulations contained in the present law, especially as it is repealed by the statute of Queen Anne; there are however some particularities in it which deserve notice. It is also said, that there are many mistakes in the proportions between the weight of bread as settled, and the price to be paid for it [*w*], which is very possible, as the legislators in those days were not very accurate arithmeticians.

The offender against this law, for the first and second offence (if a baker) is to be amerced, and for the third, *patiatur judicium corporis* (sc. *collustrigium*); if a brewer (*braciatrix*), the punishment is *trebuchetum* five *castigatio*. It seems difficult to assign any reason why the baker and brewer should, for very similar offences, be punished in a different manner by the same law, if the word *braciatrix* is not attended to, which signifies a *woman* brewer, though it is translated as if it was *brasiator*, which is the only word to be found in Du Cange. Women therefore at this time probably carried on this trade; and we find, by the citation from Gale, that many of them attended this parliament [*x*]. The punishment of the *braciatrix* is the *trebuchetum* [*y*], translated the *tumbrel*, which is the same with the

[*w*] Clarke, on the Connexion of Saxon and Roman Coins, &c. p. 22.

[*x*] In the Anglo-Saxon both bæcepe, a baker, and bæceƿƿe, a bakress, are used. By 37 Edw. III. cap. vi. *bracerescas* and *pefterescas* are mentioned, and classed with other trades carried on by women. Harrison, in his description of *Britayne*, speaks of *aylewives* using deceits in brewing, so late as the time of Queen Elizabeth, p. 96. A. And it is still said in Wales, that no one hath reason to expect good ale, unless *he lies with his brewer*.

[*y*] The most common signification of *trebuchetum* is a machine, anciently used in the siege of towns. The etymology of the word, in the sense we use it, seems to arise from the Celtic, *tre*, which Bullet renders *ville*; and our common word *bucket*, which is likewise probably Celtic; it

the ducking or cucking stool, and a chastisement used anciently for women in this country. The baker is to be suspended by the *collistrigium* [z], or stretch-neck, and not, as it is improperly translated, by the *pillory*; for Sir Henry Spelman [a] very judiciously observes, that *pillory* [b] was formerly used to signify the offence, rather than the mode of punishment.

Both

it will then signify the *town or village bucket*. This punishment is mentioned by Harrison, to have been used so late as the reign of Queen Elizabeth. Descript. of Brit.

[z] The term in the Anglo-Saxon for this mode of punishment is *healfranz*, or *helfranz*. See Wilkins's Anglo-Saxon Laws, p. 11. which literally signifies the *catch-neck*.

[a] "*Pilloria, riæ.*" Et Cowello Pillorium, aliàs *Collistrigium*. A Gall. "*Pil.* Est supplicii machina ad ludibrium, magis quam pœnam, quo quis "*super pegmate constitutus, comprehensoque inter fauces duarum tabularum ideo cavatarum collo, spectaculum populo præbetur deridendum.*" "*Originem vocis Cowellus expetit à Græc. πυλῆ pro janua, et οραω, i. e. "**video, quod delinquens ac si per januam emissio capite prospiceret: quod "**ipse certè non probo, nec habeo tamen quod proferam. Sua Gallis re-*
"*linquo erimanda, hujus enim ipsi nobis sunt authores. Et fortè à notiori "**fonte deducunt: utpote è vernaculo suo pilleur, quod depeculatorem "**significat; cujusmodi esse noscuntur ipsi quibus hoc supplicii primo in-*
"*stitutum fuit, scil. pistores, qui suis in pane fallaciis rempub. depecu-*
"*lantur; à quo et ipsa sua nequitia pilleurie dicta fuit, quasi depeculatio:*
"*et sic vox propriè ad delicti naturam spectat, non ad supplicii instrumen-*
"*tum, quod suo vocabulo collistrigium nuncupant: licet ad hoc etiam "**postea deferatur. Suadere id mihi quidem videntur ipsa verba Statuti "**de Pistoribus, ubi dicitur, subeat judicium pilloriæ, ac si legeretur subeat "**judicium depeculationis."* Glossary.

For the form of the Pillory, and the manner in which the criminal's head was exposed in the time of Henry the Seventh, see the Collection of Prints published by the Society of Antiquaries. It is also said by the managers of the House of Commons, that this mode of punishment was first invented for mountebanks and cheats, who had abused the people from a similar station. See Rushworth, vol. ii. p. 468.

[b] *Pilleurie* is frequently used in the old French chronicles in this sense;

Both the *trebuchetum* [c] and the *collistrigium* were intended *magis ad ludibrium, et infamiam quàm ad pœnam*, say the Glossaries. It may therefore well deserve the consideration of a judge, who inflicts the punishment of the pillory (as it becomes at present the great occasion of mobs and riots) whether it can be reconciled to the original intention of the law in this mode of punishment; as also, if this riotous scene ends in the death of the criminal [d], whether he is not in some measure necessary both to the riot and the murder.

and even by later writers, as Favin, in his *Théâtre d'Honneur*, expresses himself thus: "Nos François libertins et desobéissans par leur desordre et pillerie;" vol. i. p. 751. Paris, 1620.

[c] The French word *trebuchet*, however, signifies an instrument, by which gold is weighed. See Rymer, vol. viii. part iii. p. 225. Hague edition.

[d] There hath been more than one instance of such a murder within these twenty years; particularly that of *Egan*, who stood in the pillory on the 8th of March, 1756. Salmon, who suffered this sentence at the same time, was likewise so bruised, that his life was for a considerable time despaired of. The sheriffs and other peace officers, who attended them when they stood in the pillory on the 5th of March preceding, were in imminent danger of their lives, by endeavouring to prevent these disorders. *State Trials*, vol. x. p. 447. The offence of these criminals was undoubtedly of the most atrocious nature; nor do I see why they might not have been indicted for murder, notwithstanding Mr. Justice Foster hath, in his *Reports*, p. 132. intimated his opinion, that such an indictment would not lye, and chiefly because there is no such precedent. To the honour of human nature, however, such crimes are not to be heard of in every century.

The chief intention of setting a criminal in the pillory is, that he should become infamous, and known for such afterwards by the spectators. Can an offender, whose face is covered with rotten eggs and dirt, be distinguished, so as to prevent his gaining a new credit with those who have occasion afterwards to deal with him?

STATU-

STATUTUM DE SCACCARIO [e],

51 Hen. III. A. D. 1266.

I SHALL consider this and the preceding law, entitled, *Statutum de distinctione Scaccarii*, as different chapters of the same statute, though they are in all editions printed as distinct. There being at this time no commissioners of customs, or excise, the whole revenue of the crown was not only received, but accounted for, before the officers of the Exchequer. As for the Lord Treasurer, I have a very fair and complete Court Kalendar (if I may so call it) for the year 1553, and first of Queen Mary, in which the *Lord Treasurer* is placed at the head of the Receipt of the Exchequer, without any one subordinate officer to him, as Lord Treasurer, Whatever his powers might have been, they were exercised in concurrence with the Exchequer, of which he was himself only the chief and supreme officer, without any distinct board or department as at present [f].

The Exchequer being invested with so extensive powers, was also armed with the terrors of the crown process; and it was naturally to be expected, that there should be great abuses, which could only be prevented by the interposition of the legislature. What these oppressions were, appears by the provisions of the statute. The sherives at this time gene-

[e] The statute of Roteland is styled *Statutum novum de Scaccario*.

[f] It is almost unnecessary to refer the reader to Madox's learned Collections on this and other matters of antiquity relative to the Exchequer. See also the *Theatrum Criminalium*, amongst Mr. Petyt's manuscripts in the Inner-Temple Library, where it appears that the Lord Treasurer, in the fifth year of Edward the Second, took his seat in the Exchequer. Vol. i. p. 54.

rally farmed the king's lands, and consequently were guilty of those enormities and exactions which the farmers of the public revenue have in all countries been justly charged with. One odious method of proceeding was by distraining the farmer's cattle used for ploughing (which the statute emphatically says, *gaignent* [g] *la terre*); after which he was not permitted to feed them whilst impounded. The poor beasts were either starved, or, if foddered by the king's bailiff, the owner was charged at an immoderate price for their sustenance [b]. The demand was frequently very trifling, and yet the distraining a whole team of oxen prevented the farmer from cultivating his land; the statute therefore directs, "que les destrefces soient raisonnables à la mountance de la dette (the value to be settled) par l'estimation des vesins." Even after the debt was payed, the oppression did not end; for the officers of the crown harrassed the accountants by pretending that the whole demand was not satisfied; the statute therefore most humanely declares, that, if any receipt could be produced, it should be taken to be an acquittance in full.

The first part of the statute, having provided against the extortions of the officers of the crown, proceeds to make regulations, which may prevent imposition in the collecting of duties, or in dishonest charges made upon the king. The principal revenue of the crown upon exports was, at this time, the customs upon wool, which was then sent chiefly to Flanders, and there manufactured. Accounts could not be settled in the accurate manner which prevails at present, and the

[g] The word *degayné* is therefore used to signify lands *untilled*; "leffa la terre giser freifche e *degayné*." MS. Petition, to the king in parliament, 6 Edw. I.

[b] The statute therefore allows him to feed his own cattle whilst impounded. It hath been before observed, in the comment of Magna Charta, that land was frequently held by the tenure of providing fodder for the cattle which were distrained for the king's debts.

crown.

crown was defrauded in these duties, by the articles not being sufficiently particularized. The statute therefore directs, that it shall be stated how much wool was exported in each particular ship, and how much was taken on-board, at the different ports the vessel might touch at.

The next material regulation is to prevent the king's being over-charged by his artisans and workmen, which seems *in more modern times* to deserve much to be enforced [i]. The method prescribed is, "que les *veours* des ovreigners le roy soient élus per "serment des prodes hommes;" and if the king or barons of the Exchequer have any suspicion of imposition, the reasonable price is to be settled by such viewers or surveyors.

As this is the first statute in the French language, it may not be improper to consider whence it might arise, that the ancient acts of parliament, from the present to 1 Rich. III A. D. 1483, should be generally in French; and even after the statute of Edward the Third had abolished it in pleadings [k].

The

[i] The statute continues unrepealed.

[k] Fortescue, in his 48th Chapter, *De laudibus legum Angliæ*, gives the following account of this: "In universitatibus Angliæ, non docentur scientiæ nisi in Latina lingua, et leges terræ illius in triplici lingua addiscuntur: videlicet, Anglica, Gallica, et Latina. Anglica, quia inter Anglos lex illa maximè inolevit. Gallica, quia postquam Galli, Duce Wilhelmo Angliæ Conquestore, terram illam obtinuerunt, non permiserunt ipsi eorum advocatos placitare causas, nisi in lingua, quam ipsi noverunt, qualiter et faciunt omnes advocati in Francia, etiam in curia parliamenti ibidem. Consimiliter Galli, post eorum adventum in Angliam, ratio- cinia de eorum proventibus non receperunt, nisi in proprio idiomate, ne ipsi inde deciperentur. Venari etiam, et jocos alios exercere, ut *talorum et pilarum ludos*, non nisi in propria lingua delectabantur. Quo, et Anglici ex frequenti eorum in talibus comitiva, habitum talem contraxerunt, quod *huc usque ipsi in ludis hujusmodi, et compotis, linguam loquuntur Gallicanam*: et placitare in eadem lingua soliti fuerunt quousque mos ille,

The ancient laws of some other European nations are indeed in the Latin language, in which there was a peculiar convenience from the frequent appeals to the pope; but there is no other instance of any country in Europe permitting their laws to be enacted in a *modern European language* [l], and that not their own. The ancient ordinances of Scotland are in Latin; those of the Saxons in the Saxon tongue; and the ancient statutes of the Irish parliament, which begin with the statute of Kilkenny, in the reign of Edward the Second, are in English [m], while those of England continued to be in French. The laws of

“vigore cujusdam statuti, quamplurimum restrictus est; tamen in toto
 “hucusque aboleri non potuit, tum propter *terminos* quosdam, quos plus
 “propriè placitantes in Gallico, quam in Anglico, exprimunt, tum quia
 “*declarationes super brevia originalia*, tam convenienter ad naturam bre-
 “vium illorum pronuntiari nequeunt, ut in Gallica, sub quali sermone
 “*declarationum hujusmodi formulæ addiscuntur.*”

It is likewise well known, that a coat of arms cannot be blazoned but in French; nay, Dr. Wallis hath observed, that, though the terms of the animals, *sheep*, *cow*, and *calf*, are of Saxon origin, yet, that the English words for the flesh of them are derived from the French, viz. *mutton*, *beef*, and *veal*: it should seem from this, that we borrowed our most early cookery from that nation. Our terms in sporting are likewise commonly derived from the same source; as, *bevy*, *covy*, *entapis*, &c.

Suetonius says, that Caligula, when he intended to take advantage of his penal edicts, caused them to be written in so small characters, and to be hung up at such a height, that no one could read them. This Hayward, in his Life of William the Conqueror, applies to the English laws being in French.

[l] There is an ordinance, in Scobell's collection, for the translation of all the reporters from the old law French into English, which likewise directs all the law-proceedings to be translated from Latin into English; and by another ordinance of the following year (viz. 1651), the translation is to be referred to the lords commissioners, speaker, and the judges. The same ordinance forbids the use of the old court-hand.

[m] There is at least no mention in the edition of the Irish statutes, published by authority, of their having been translated.

Sweden

Sweden and Denmark were originally in their own languages [n]; but have, within the last century, been translated into Latin. The ordinances of Spain are in Spanish, and that infinitely more pure than could be expected from their antiquity [o]. They may probably indeed have fixed their language, as the translation of the Bible is said to have fixed our own [p]. The ancient laws of Sicily are in Latin; as were also those of the other Italian states.

At the beginning of the sixteenth century, a return was made of all the customs in the different provinces of France, which have been published by Du Moulin, in two very large volumes. The only collection of these ordinances, which is in the Latin language, is that of Thoulouse; all the rest are in the provincial dialects or patois; and, from those provinces which border on Spain, the language used is the Basque, or a corrupt mixture of French and Spanish [q]. The reason generally given for our statutes being in French, viz. that it was the will of the conquering Normans, is by no means satisfactory: if this was the true reason, the laws, from William the First to the reign of Henry the Third, would have been in that language. Now, in the collection of these ordinances published by Wilkins, there is but one such instance, and that is printed as being a translation from the Latin, which is considered as being the original. Besides this very con-

[n] *Bysnaga* is therefore most grossly mistaken, when he asserts, that the Normans are the only nation in Europe, whose ancient laws and customs are not in the Latin language.

[o] See the Observations upon Magna Charta.

[p] There is a Spanish letter, from the Black Prince to the Count of Trastamara, which scarcely differs either in the language or spelling from that of the modern Spanish. Rymer's Fœd.

[q] This fully proves that Bullet is mistaken, when he asserts, in his Preface to the Dict. Celtique, that all the laws of France were in Latin till the time of Francis the First.

clusive

clusive proof there is no French instrument, in Rymer's most stupendous collection, till the year 1259 [r], which complemen^t begins above a century before, viz. in the year 1101, during which period every record is in Latin; and agreeable to this remark, the present statute (the first in the French language) is just two centuries after the Conquest. The continuance of our laws in French after this first instance, seems to have arisen from there being a standing committee in parliament to receive petitions from the provinces of France, which formerly belonged to the crown of England; as these petitions therefore were in French, and the answers likewise in that language, it might probably be a reason why all the parliamentary transactions should be in French by way of uniformity [s]. This conjecture seems to be strongly confirmed by the statutes having continued to be in English, from the time in which we *fortunately* were dispossessed of the French provinces, as most of the statutes in the reign of Henry the Sixth are in French.

Another reason for the statutes being in French, arose from the general affectation which prevailed at this time of speaking

[r] Vol. ii. p. 13. Hague edition. The first English instrument in Rymer is in the year 1386; it is scarcely however intelligible to a modern Englishman. After this, there are some few others in English, which begin with the reign of Henry the Fifth; and particularly the postscript to a letter by that king. Rymer, vol. ii. part i. p. 152.

[s] This likewise seems to be the reason of a law's receiving the royal assent in French, which, as foreigners generally attend that ceremony, should be abolished. I have heard of its being difficult to translate these old forms: I should conceive that these three words would answer every purpose, and unexceptionably: BE IT SO. Oliver Cromwell, when protector, used this form: *The Lord Protector doth consent*. See Whitl. Mem. p. 661. A. D. 1657. The precise sets of words, by which the several sorts of statutes are to pass, are stated in the Journals of the House of Lords, February 8, 1597, 39 Eliz.

that

that language, inſomuch as to become a proverb, that *Jack would be a gentleman, if he could ſpeak French* [*t*]. It was very corrupt indeed; and therefore Chaucer [*u*] ſays,

“ And Frenche ſhe ſpake full fetouſly;
 “ After the ſcole of Stratforde at Bowe,
 “ For *Frenche of Paris* was to her unknowe.”

It was however ſo neceſſary, that Robert of Eglesfield, who founded Queen’s College in Oxford, and was confeſſor of Philippa of Hainault, queen of Edward the Third, directed, by his ſtatutes, that the ſcholars ſhould ſpeak either French or Latin [*w*].

[*t*] Verſtegan mentions this proverb; but ſays, that ſome of the Engliſh adhered ſtrongly to the uſe of their native language; and that he had himſelf ſeen many monuments of the ancient Engliſh in Normandy, which were in Engliſh, p. 182.

Hickes, in his Introduction to his learned Theſaurus, gives the following extract from a manuſcript, in the year 1385, “oon is (ſc. reaſon) for “ children in ſchole, agenſt the uſage and manner of all other nations, “ beeth compelled for to leave hire own language, and for to conſtrue “ hire leſſons, and here thinges in Frenche, and ſo they haveth ſethe “ Normans come firſt into Engelande; alſo gentilmen children beeth “ taught to ſpeke Frenſche, from the time that they beeth rockked in here “ cradel And uplondiſhe men will likne hymſelf to gentylnen, “ and fondeth with gret beſyneſſe for to ſpeke Frenſhe for to be told of.” Præ. p. xvii. It is afterwards obſerved, in the ſame manuſcript, that Engliſh began to be the language into which ſchoolboys conſtrued their leſſons in the reign of Richard the Second. Gervafe of Tilbury, who lived in the reign of Henry the Second, ſays, that it was then difficult to know an Engliſhman from a Frenchman; and Giraldus Cambrenſis, his contemporary, wiſhes (in the Introduction to his Topographia Hiberniæ) that it might be tranſlated from Latin into French, in order to make it more generally known.

[*u*] Prologue to the Priorefs’s Tale. It was indeed afterwards puniſhable in mootiſg at the Inns of Court to pronounce French properly. See a pamphlet written by one Cock, in 1654.

[*w*] Fuller’s Worth. p. 222.

But

But the strongest reason for permitting our laws to be in the French language arose from the English, and the inhabitants of the French provinces under our dominion, considering themselves in great measure as the same people. The lawyers of the time therefore not only made use of it in their pleading, but conversation: thus, Chaucer [x] makes his man of law say,

Hoste (quoth he) de pardeu jeo assent.

We never hear, in the very ancient chronicles, of that national animosity subsisting between the English and the French [y], which hath since been occasioned by the obstinate wars between the two countries; and in more late times by Lewis the Fourteenth affecting the monarchy of Europe [z]. It was reserved for the reign of Lewis the Fifteenth, in a royal edict, to style the English *nos véritables ennemis*. Patin, indeed, hath declared his sentiments on this head very explicitly, “moi qui hais naturellement les Anglois, je ne pense qu’avec horreur à cette nation [a].” Perron, however, prefers us to the Germans, but not in a very flattering manner. “La plus envieuse, et la plus brutale nation a mon grès, c’est l’Allemande; les Anglois encore font plus polis de beaucoup [b].”

[x] Prologue to his Tale.

[y] The foreigners, against whom the clamour at this time ran the strongest, were the Italian clergy, who procured the most lucrative benefices from the court of Rome, to the prejudice of the native English. This clamour occasioned very dangerous riots in the reign of Henry the Third. Carte, vol. ii. p. 34.

[z] We do not find that the alliance between Cromwell and the French was an unpopular measure even so late as the last century; nor in the preceding, was the English nation at all alarmed with the proposed alliance between Queen Elizabeth and the Duke of Anjou.

[a] Patiniana, p. 18.

[b] Perroniana, p. 16.

I can-

I cannot conclude these remarks without taking notice, that the present statute of Henry the Third, in French, is inserted between others in Latin; which is equally to be observed with regard to the thirty-fourth chapter of Westminster the second.

From a very diligent and attentive perusal of the Statute-book, the best general rule which can be given, with regard to an act of parliament's being in Latin or French, is, that when the interests of the clergy are particularly concerned, the statute is in Latin. I do not however pretend to say, that this rule is without its exceptions.

K

STATU-

STATUTUM DE MARLEBRIDGE [c],

52 Hen. III. A. D. 1267.

THIS is the last statute in the long reign of Henry the Third; and it contains many wise regulations with regard to civil property, which had been in a very precarious state during the preceding troubles. Of this, if other proof was wanted than the general histories of the times, it would be sufficient to read the *Edictum de Kenilworth*, which was made the preceding year, and is printed in most editions of the statutes. The first chapter relates to distresses, which, it hath already been observed, were most oppressively used. If complaint was made of this oppression, the barons insisted upon determining the charge against their own officers in their own courts, and would not permit those of the king to hold conusance. It hath already been remarked on the twelfth chapter of the statute of Merton, which was made two and thirty years before the present law, that the king refused his assent to an attempt of the same kind, when the barons insisted upon deciding all offences committed in their own forests, or warrens, by their own jurisdictions. Those powers which they could not obtain from the king, they exercised (as it appears by this statute) during the ensuing troubles; and it was high time to put a stop to these enormities and violations of justice, which was effected by removing the complaint from the court of the great

[c] Marlebridge, where this parliament was held, is supposed to be the same with the town at present called Marlborough, of which there seems to be some reason to doubt, as the terminations are very different. In Saxton's maps, this town is spelt Marlingesboro. The city of Lincoln, in the old statutes, is however always called Nicoll, or Nichole, which is a greater variation from the modern name.

Baron to those of the King, where the judges were indifferent between the oppressed peasant, and the tyrannical lord.

C A P. XI.

PROVISUM est etiam, quod nec in itinere justic', nec in comitatibus, in hundredis, nec in curiis baronum, de cetero capiantur fines ab aliquibus pro pulchrè placitando.] Sir Edward Coke is very anxious to explain, that this fine was not imposed upon the *pleader* for his mistake, but that it was paid by the party, for leave to amend a bad plea. He does not however cite any record or authority in proof of what he asserts, and (*pace tanti viri*) I should imagine that this mulct was paid by the pleader, who was certainly the most in fault [*d*]. In other countries, advocates have been

[*d*] The opinion of Sir Edward Coke with regard to the fine *pro stultiloquio*, is what he says in his second Inst. p. 122. In the Preface however to his Book of Entries, when he had occasion to be more accurate on this head, he allows that at common law this fine was payed by the pleader, and not by the client. His words are these: "Radulphus de Bardfield qui *narravit* pro filio Furoldi, in misericordia pro stultiloquio." He then cites a record of 5 Hen. III. adding (by way of comment) "quod inter alia acta publica evincit manifestè juridicum eà tempestate, non clientem mulctatum fuisse; iniquum enim censebatur clientem poenas luere pro delicto jureconsulti, quod sane nihil aliud fuisset, quam in miserum cumulasse miseriam." He then adds, "Dominus Robertus de Willoughby anno 24 Edw. tertii jurisperitos ad septum curiæ allocuturus dixit, *Jeo ay view le temps que si vous ussez plead un erroneous plea, que vous alastes al prison.*"

By a statute of James the First of Scotland, the advocate is to take the following oath:

- " Illud juretur, quod lis sibi justa videtur,
- " Et si quæretur, verum non inficietur;
- " Nil promittetur, nec falsa probatio detur;
- " Ut lis tardetur, dilatio nulla petetur."

" Si conscientia caofidico dictat causam esse injustam, pro eà loqui non debet." Speculum Suevicum, c. lxix.

been subjected to penalties even for prolixity [*e*], which appears by an ordinance of Charles the Seventh of France, as also many to the same purport by his successors [*f*]. This power of fining for a bad plea, however, whether it might be imposed on the party, or the advocate, had been undoubtedly much abused, and particularly in the inferior courts, where the mulct was paid to the lord: we find by the nineteenth chapter of the present statute, as well as by an article of Magna Charta, that amercia-

Sir Edward Coke, in his speech which he made in one of the Temple-halls, in the year 1614, on a call of serjeants, mentions this anecdote with regard to the scruples of Littleton and Coke about a false plea: "They were, in Henry the Sixth's time, intreated to save a default in a real action, viz. that, by the greatnesse of the waters, their client could not pass for sixteen days; which they holding untrue, refused to pleade." Peryt Mss. vol. ii. p. 135. In Saxony, the advocate is punished for an improper jest on any of the parties to the suit. Fynes Morryson's Travels, part iii. p. 220.

[*e*] In the court of session in Scotland, the lords have to this day an hour-glass before them.

The Roman advocates used to make a sort of agreement with the court, how long they might have a liberty to speak in defence of their client, as appears by the following epigram of Martial:

"Septem clepsydras magnâ tibi voce petenti

"Arbiter invitus, Cæciliane, dedit;

"At tu multa diu dicis, vitreisque tepentem

"Ampullis, potas semisupinus aquam.

"Ut tandem saties vocemque sitimque, rogamus

"Jam de clepsydrâ, Cæciliane, bibas." L. vi. ep. 35.

This epigram of Martial's explains a passage in Dio Cassius, which mentions the giving *water* enough to those who were engaged in law-suits:

Και γὰρ τοῖς διαζομένοις ὕδωρ ἱκανὸν ἐνεχεν. L. lxxvi.

Pliny mentions, in his Letters, that he had spoken before the Roman senate for seven hours with great applause and attention, at least according to his own account of this matter.

[*f*] See Ord. Royales, Paris, 1552.

ments

ments were equally abused in the inferior courts, and for the same reason.

C A P. XXIV.

JUSTICIARII itinerantes de cetero non amercient villatas in itinere suo, pro eo quod singuli XII annorum non venerint coram vicecomitibus et coronatoribus, ad inquisitionem de roberiis, incendiis domorum, vel aliis ad coronam spectantibus faciendis. Dum tamen de villatis illis veniant sufficientes, per quos inquisitiones hujusmodi plene fieri possunt, exceptis inquisitionibus de morte hominis faciendis, ubi omnes XII annorum venire debent, nisi rationabilem causam habeant absentiae suae.

It was an ancient regulation of police, that every inhabitant of a country, who was above the age of twelve years, should attend the sheriff's *tourn* in order to hear the *capitula coronae* read over, and given in charge. This, before the establishment of justices in eyre, was the only opportunity of their being instructed with regard to the crown law, and it was probably supposed that such a charge would not only be understood by a child above that age, but make a very lasting impression. As it was very inconvenient however and expensive for all the inhabitants of a county to attend, the statute of Magna Charta very properly confines these *tourns*[g] of the sheriff to be held.

[g] Magn. Chart. c. xxiii. Stiernhook gives the best account of the signification of this word *turn* or *tourne*. “Judicia antiquitus *Hwarp*” (five *Hwarp*) dicta fuerunt, quæ vox hodie circuitum, revolutionem, “feu vicissitudinem, significat, five quod judicia ad revolutiones solares” vel lunares haberentur, five quod in unum conveniens multitudo judici “circumfusa conglomeraretur, five denique quod per vices, facto circuitu” singuli territorii patresfamilie ad judicia convenire tenerentur, prout in “antiquo et novello jure præceptum exstat.” Cap. ii. This agrees with the common meaning of the Saxon word *torne*, or English *turn*, and the sheriff's court so called was held for these very purposes. An ingenious friend derives the word *attorney*, from his attending these courts. The bishop of Dumblain, in Scotland, had a writ on this chapter of the statute of Marlebridge. See Prynne's Records, vol. iii. p. 183.

only

only twice in a year; but, as whole townships were frequently amerced for neglecting to appear, this statute dispenses with such attendance, provided there is a jury, consisting of a sufficient number to punish offenders. It excepts indeed the case of murder, which crime the legislature thought it incumbent upon every one either to prosecute, or to conceive a just horror of.

There was at this time another great abuse in indictments for murder, which is regulated by the next chapter; the words are, "*Murdrum de cetero non adjudicetur, ubi infortunium tantummodo adjudicatum est; sed locum habeat murdrum de interfectis per feloniam tantum.*" The word *murdrum* is in the common translation very improperly translated *murder* [b], whereas in this place it signifies

[b] Thus Du Cange inform us, that *adulterium*, in old records, is the fine imposed, and not the offence; the word *murdrum* however signified sometimes, in the old Saxon and Danish laws, what we now understand by it. For example, there is a chapter amongst the laws of Canute, *De murdro occulte perpetrato*. Dec. Script. p. 915. And by the Swedish law also "qui alium trucidat et abscondit, *morder* dicitur." Themis Romano Suecica, Gryphiswaldiæ, p. 210. "Murtre est quant home est tué de nuit, ou en repos." Aff. de Jerusalem, cap. lxxxv. "Meurtre si est quand l'on tue home ou femme, de jour ou de nuit, en son lit ou en en autre maniere, pourvoy ce ne soit en melée, ou sans panfer, ou sans li deffier." See the Glossary to Geoffroy de Ville-Hardouin, inter Script. Byz. As likewise Stiernhook, p. 347, et seq. who not only gives the same signification of the word *morda*, but also says, that the district, in which such a crime was committed, paid a severe fine; to which however women and children under fifteen years of age did not contribute, as not being supposed to participate of the guilt.

It were to be wished, that the writers on the crown law would call manslaughter (a word that conveys no precise idea) by the old Saxon term of *reoht** (the same with *fight*), and which therefore signifies what is now meant by the word *man-slaughter*, i. e. the killing a man upon a sudden provocation which occasions a fight or scuffle. In the Saxon Chro-

* *Febia* is the word used in the ancient German law, and in this sense likewise. See Schilter, Gloss. Teut. in articulo.

fies a fine imposed upon a township, where, as Bracton expresses it, *occulta hominis occisio intervenerat*. If the township did not produce or prosecute such a murderer, it was but a proper punishment to fine the inhabitants for such neglect, or concealment. I have before observed, that fines imposed by the sheriffs were anciently one of the great branches of the king's revenue; and we therefore find that the power was always perverted from the purpose of justice to the filling of the king's coffers, especially if there was an opportunity of fining a whole district, as such mulct was proportionably larger. If a man therefore was killed *per infortunium tantum* [i], as the statute expresses it, the township

nicle, A. D. 997, man-rihtum is applied to slaughter in a battle; man-rihte may also signify the *wicked* scuffle from man, *scelus*, and rihte, *pugna* *. By the law of Scotland there is no distinction between murder and man-slaughter, nor by the civil law; and therefore a criminal indicted for murder, under the statute of 27 Hen. VIII. where the judges proceed by the rules of the civil law, must either be found guilty of the murder, or acquitted.

[i] The law of Spain is so far from allowing a forfeiture in a case of accident or self-defence (of which there seems to have been some doubt amongst our writers on the crown law), that it exhorts every one to make use of it, "ca meyor mientras que vive que se defenda, que dexar que lo venge depoy su morte." *Fuer. Jusg. p. 330. for it is better that he should defend himself when alive, than to leave it to others to avenge him when he is killed.* Self-defence is indeed forbidden by the law of Japan; Kempfer (who from his two years residence in that country must have been well informed) says, that, if the aggressor is killed, the survivor hath only permission to be his own executioner. The Japanese are not only *toto divisos* or *be* by situation; they are still more so by their laws and customs.

It hath struck *Hobbes* as a great singularity and severity in the law of England, that, if a man intending to steal deer (a case put by Sir Edward Coke) shoots at a buck, and the arrow glances on a by-stander, this should be deemed murder from the act being felonious. He therefore asks, if a

* It is an ingenious remark of Mr. Lye's, that the same word *Eob* signifies, in Saxon, both *God* and *good*, as the term, man, imports both *man* and *wickedness*.

township was equally amerced, as if a secret and concealed murder had been committed.

boy stealing apples from a tree falls upon the head of a person under it, and kills him, whether this should be considered as murder. Dialogue between a Lawyer and Philosopher. Hobbes's Works, p. 622. ed. 1750. The case is ingeniously put by this very acute writer; but, to make it in all respects similar, he should suppose a man endeavouring to break into a house with intention to steal, and to fall upon a person passing under, and so occasion his death; as the stealing apples from the tree is not a felonious intent by our law, because they are considered as belonging to *the reality*, or in other words are a growing vegetable production, which, before the use of walls and other expensive inclosures, were considered as affording too strong a temptation to the passer-by, who perhaps was merely in his road from one place to another. Besides this, there was not anciently any valuable fruit which it was worth while to pick or carry off.

In Malta however, where the soil scarcely covers the rock which pervades the whole island, it is highly penal to steal soil from a neighbour's ground. See Dumont's Travels, vol. ii. p. 266. In the Orphan of Chao also (published amongst the Chinese Miscellanies), a large Chinese half-famished lies under a mulberry-tree, in hopes that some of the fruit will drop into his mouth, and will not pick it, dreading the imputation of larceny; p. 191.

Hobbes's case, however, when altered, as I have proposed, might still receive this answer, that the death of the person passing under was not a *probable* consequence of the felon's endeavouring to break into the house. Mr. Locke likewise puts a very singular case with regard to justifiable homicide.

"A man with a sword in his hand demands my purse in the highway, when perhaps I have not 12*d.* in my pocket; this man I may lawfully kill. To another, I deliver 100*l.* only whilst I alight, which he refuses to restore me when I am got up again, but draws his sword to defend the possession of it by force, if I endeavour to retake it. The mischief this man does me is a hundred or possibly a thousand times more than perhaps the other intended me (whom I killed before he really did me any), yet I may lawfully kill the one, and cannot so much as hurt the other." Locke on Civ. Gov. book ii. ch. xviii.

C A P. XXVII.

SI clericus aliquis pro crimine aliquo, vel retto, quod ad coronam pertineat, arestatus fuerit, et postmodum per preceptum domini regis in ballium traditus [fuerit], vel replegiatus exiterit, ita quod hii quibus traditus fuerit in ballium, eum habeant coram iusticiariis, non amercientur de cetero illi quibus traditus fuerit in ballium, nec alii pleg' sui, si corpus suum habeant coram iusticiariis, licet coram eis propter privilegium clericale respondere noluerit, vel non possit propter ordinarios suos.] When the great dispute first began between Henry the Second and Thomas Becket, it arose from this privilege claimed by the clergy, or rather the archbishop, which that wise king endeavoured to abolish. The arguments in this controversy may be seen in Fitz-Sтивен's Life of Becket, who was his archdeacon, and present at the assassination. It is not only the curious anecdotes which commend this life, but the style, which is in some parts indeed too figurative, but shews a very familiar knowledge of the classical poets. The Latinity of the writers, during the reign of Henry the Second, was more pure than in many of the following ones. It hath indeed been too generally presumed, that the monks of these times were ignorant of classical learning, from Caxton speaking in one of his Prefaces of Virgil's *Æneis* as a story then hardly known, and without any commendation of the poetry; but it appears by Fitz-Sтивен, that there were schools in London during the reign of Henry the Second, in which he says, that the scholars daily *torquent enthymemata*, an expression, which shews he was well versed in Juvenal [k]; from which, and many other circumstances, it may

[k]

"curtum sermone rotato

"Torqueat enthymema." Sat. vi.

"Nec quicquam effœminatè fingentes *tenèro* (ut Persius ait) *supplantarent verba palato.*" Will. Malm'sb. de gestis Pontif. l. iii.

See also Giraldus Cambrensis, who makes an apology for using an expression

may be inferred, that learning had at this time made no inconsiderable progress.

I have now made some observations upon nearly all the statutes of the reign of Henry the Third [l]; and as they are the most authentic materials upon which any history can be founded [m], I cannot but say, that he by no means deserves to be considered in so contemptible a light as he hath generally been represented [n].

The

pression "*Latine minus.*" De vitâ Galfridi, c. ix. and also laughs at the bishop of Ely, for having said "*ubi evanuit gloria,*" instead of *quo*, c. xix. In another place he gives a whole speech of a Welsh hermit, who made use of no part of the verb but the infinitive. Ibid. part ii. c. ii. John of Salisbury, who lived in the time of Henry the Second, was as well versed and as ready in citing the Latin Classics, as the men who have been most eminent for this knowledge in more modern times. See the Polycraticus, passim. The Saxons also seem to have made a distinction between the Latin which was spoken by some of the clergy, and what was to be found in the classical books, *And ðý ylcan ȝeape æteopbe ȝe ȝteopna, ȝe mon on boc-leðen Lometa hæτ.* Saxon Chron. p. 91.

[l] All, except the two statutes entitled the *Dies Communes in Banco.*

[m] "*Ecquid est quod tam propriè dici potest actum ejus, qui in re publicâ versatur quàm lex. Quære acta Gracchi, leges Semproniae proferentur. A Cæsare ipso si quæreres quidnam egisset in urbe et togâ, leges multas se respondeat, et præclaras tulisse.*"

[n] It is not by this intended to insinuate that he was a perfect character, or a truly great king, but only that his disposition seems to have been good. He had the misfortune to come to his crown between the age of nine and ten, and there are few instances of such almost infantine kings answering the expectations of their people. In our own history, Richard the Second and Henry the Sixth are striking instances of this observation; for which there seems to be an obvious cause, as a minor king hath generally a worse education than he who is only destined to a throne. Flattery hath often been said to be the bane of crowned heads; and an infant king, exercising most acts of authority in his own person, is easily taught to conceive more highly of himself than a mortal should do. Hence Ben Jonson says, "Princes learn no art truly but the art of horsemanship; the reason is, the brave beast is no flatterer; he will throw a prince as
" soon.

The truth is, that, in the earlier parts of the history of any country, we are apt to read it as a romance, in which he who fights the greatest number of battles in person, is the hero of the tale, and the wonder of the reader:

“*ſævas curre per Alpes,*

“*Ut pueris placeas.*”

The reign of Henry was not ſet off with the glare of conqueſt, but as a legiſlator he certainly had uncommon merit; and if it is alledged, that the confirmation of the two Great Charters was extorted from him, the laws againſt the oppreſſion of revenue-officers [o], as well as the beneficial regulations of the ſtatutes of Merton and Marlebridge in oppoſition to the tyranny of the “ſoon as his groom.” *Discoveries*, p. 704. ed. 1692. A moſt extraordinary inſtance of this proſtitution of adulation to a minor king is mentioned by Fabian, in his Chronicle, which I ſhall give in his own words: “Henry the Sixth, when but eight months old, ſat in his mother’s lap in “the parliament chamber; and the ſpeaker made a famous *propoſition*, in “which he ſaid much of the providence of God, who had endowed the “realm with the preſence of *ſo toward a prince, and ſoveraign governor.*” p. 410. When Queen Mary was ſuppoſed to be near the time of her delivery, the curate of St. Anne’s Alderſgate went ſtill further, by giving a particular account of the proportion and features of the young prince, repreſenting him as the ſtrongeſt, the fineſt, and the moſt amiable child in nature. *Carte*, vol. iii. p. 317.

As men advance in years, ſome new wants muſt ariſe, new powers be graſped at, and new deſires gratified, otherwiſe there is an inſipidity even in the poſſeſſion of a throne. When a minor king therefore arrives at more mature years, the common preeminences of his ſtation begin to pall, which he hath already ſo long exerciſed and enjoyed. Might it not poſſibly be owing to the minority of Lewis the Fourteenth, that, tired of being conſidered as king of France only, he at laſt involved his own country and Europe in ſuch diſtreſſes, by affecting the general empire of it?

[o] *Statutum de diſtinctione Scaccarii*. *Carte* alſo obſerves, that Henry the Third levied very little upon his ſubjects, though his reign was long.

*As Ridiculous at the
late Address of the
French to Buonaparte
by Jonathan*

barons, must be allowed to him on the other side of the account. We shall find, in the course of these observations, that some of the reigns of those kings, who are so much celebrated for their victories [p], produced laws of infinite oppression. The time will come, when a sovereign revered by Europe, adored by his subjects, having no occasion to repel the invasion of an enemy nor crush a home-bred rebellion, will shew that a steady attention to the true welfare of his people will form the most amiable and respectable character in history, though the conquests of his reign may have been obtained by his generals.

[p] I will just mention, by way of instance, the statute of *quo warranto* of Edward the First, which Hollinhead likewise informs us was enforced in Ireland by Edward the Third, and the 2 Hen. V. c. vii. against Hereticks.

“The greatest sums that ever were levied (comparing the value of money at that time with what it is now) were raised by King Edward the Third, and Henry the Fifth, kings of whom we glory now, and think their names an ornament to the English history.” Hobbes’s Works, p. 596. ed. P750.

WESTM. PRIMER,

3 Edw. I. A. D. 1275.

CEUX sont les establisments le roy Edward fitz le roy H. faits a Westm. a son primer parliament general apres son coronement, lendemain de la cluse de Pasche, lan de son raigne 3. per son counsel, et per l'assentment des Ercevesques, Evesques, Abbés, Priours, Countes, Barons, et la Cominaltie de la terre illeques sommonés.]

This parliament was not held by Edward the First till the third year of his reign, on account of his being in the Holy Land [q] at the death of his father. The preamble to this statute makes the first use of the word Parliament, which is said to be a *general one*: "*per son counsel, et per l'assentment des Ercevesques, Evesques, Abbés, Priours, Countes, Barons, et la Cominaltie de la terre illeques sommones.*" The last words *la Cominaltie de la terre*, seem to explain what a *general parliament* was, in contradistinction to a more confined one, where perhaps only lords and prelates attended [r].

The word Parlement, or Parliament, was by no means restrained at this time to the signification of a convention of the king, lords, and commons, as it is used at present, but imported nothing more than a conference, or conversation. In this sense

[q] He had been out of the kingdom on this expedition nearly five years, viz. from 1269 to 1274.

[r] In the chronicle of Thomas Wykes it is said, "*Quòd anno 1284, Rex Edwardus venit Bristoll, et habito ibidem cum quibusdam regni sui magnatibus non universali, sed tanquam particulari, et speciali parlamento.*" Gale, vol. iii. p. 112. "*Sous les deux premieres races, on assembloit souvent la nation, c'est à dire les Seigneurs et les Eveques: il n'étoit point question des Communes.*" Montesq. t. iii. p. 176. 12^m.

Froissart

Froissart frequently uses the word, as “*les Chevaliers François et Anglois qui au parlement etoyent venus.*” So Thomas Wykes, in his Chronicle, “*Rex Edwardus habiturus parliamentum cum Lewelino principe.*” Thus also Gower [r], speaking of a transaction in Greece, says,

“The Lordes of common assent,

“The time set of *parlement.*”

The Italian word *parlamento* is likewise used in the same sense:

“E tanto pure vedendo i parlamenti,

“Stavano cheti, e per udire intenti [s].”

Lord Coke's etymology of the word Parliament, from *speaking one's mind*, hath been long exploded; if one might presume to substitute another in its room, after so many guesses by others, I should suppose that it was a compound of the two Celtic words, *parly*, and *ment* or *mend* [t]. Bullet renders *parly* by the French infinitive *parler*; and we use the word in English as a substantive, viz. *parley*; *ment* or *mend* is translated *quantité*, *abondance*; the word Parliament, therefore, being resolved into its constituent syllables, may not improperly be said to signify what the Indians of North-America call a *Great Talk*.

Having risked this conjecture upon the etymology of the word Parliament, on which so much hath been already hazarded by different writers; I shall now proceed to consider some of the chapters of this collection of laws, which is generally styled *Westminster the First*, to distinguish it from another *capitulary* made by Edward the First, in a parliament likewise held at Westminster in the thirteenth year of his reign, and which is there-

[r] *Confessione Amantis*, l. iii. p. 58. B.

[s] Ariosto, *Orl. Fur.*

[t] Both these words are to be found in Buller's Celtic Dictionary, published at Besançon in 1754. *Maint*, in the old French writers, is often used in the same signification with the Celtic word *ment* or *mend*; as, “*maint amant, plusieurs amants, maint chevalier, plusieurs chevaliers.*”

fore called *Westminster the Second*. I have already observed, from the words of the preamble, that this was a *general parliament* [u]; and the attendance was the greater, as the same opportunity was taken to swear allegiance to their new king, who was in the Holy Land at his accession to the throne: the chronicles therefore call this *famosum et solemne parliamentum* [w].

The first chapter (according to Sir G. Mackenzie's observation before alluded to in the Comment on Magna Charta, cap. i.) begins with a declaration of the rights of the clergy. The crown in all countries hath always thought it good policy to procure the support of this body of men; and a king just then arrived from a religious expedition was undoubtedly willing to promote

[u] Those who have an inclination to see all the learning which hath been collected, with regard to the commons having been anciently a part of the legislature, may consult Tyrrel's *Bibl. Polit.* It seems to be at present little more than a point of speculation, for the discussion of an antiquary. I will only say, that no one can read the old historians and chronicles, who will observe any strong allusion or trace of it, if he does not sit down to the perusal with an intention of proving that they formed a component part. It is an indisputable proof, that feudal tenures were not known to the Saxons, by their having no terms for such services; and it is as strong an argument against the existence of this third branch of the legislature, that there is no direct mention of the intervention of the commons by the old historians. Even so late as the thirty-first of Henry the Eighth, the entry in the Journals of the House of Lords is, "presente etiam toto populo, et plebe de domo Communi." Journals, June 28, 1539.

[w] The preparations for the king's coronation at the same time are mentioned as most extraordinarily expensive. Every sheriff of the counties, within 150 miles of London, is ordered to send sixty oxen and cows, sixty hogs, two fat boars, sixty fat sheep, and three thousand capons and hens, of which last article some of the counties are to send five thousand. Besides this, the Great and Little Hall (as they are called) were newly white-washed and painted: "Ita quod oculi intra illas intrantium, et tantam pulchritudinem intuentium, plenius deliciis et gaudio repleantur." Petyt Mss. vol. XV. p. 1, et seq.

what was represented to him as beneficial and advantageous to their interests. It appears, by the thirty-sixth chapter of Magna Charta, that bequests to monasteries had even then extended so far, that it was thought necessary to restrain them. The clergy were not contented however with engrossing estates to the disherison of heirs, and near relations; but by this statute insisted to hold these benefactions without any burden or inconvenience whatsoever. At this time there was little or no accommodation for travellers, especially if they travelled with a suite [x]. Here and there a castle was indeed to be found; but the great baron, who was the owner, rather considered the strength of the fortifications, than any conveniences of reception. The religious houses, on the other hand, being protected by the sacred characters of those who lived in them, had no occasion to expend any thing with a view to their defence, and had nothing to consult but what might contribute to accommodation. It was not sufficient to provide lodgings merely for their own body; their benefactors, at the same time that they disinherited their heirs, commonly gave them what was called a *corody* [y], which was a provision to prevent their poor relations

[x] The lodging the king's *counsellors*, and particularly the justices in eyre who had many attendants, was at this time complained of. The monastery of *Bardney* petitioned Edward the First, in the sixth year of his reign, that they might not be troubled with guests, till they had paid off a heavy debt which they had contracted. See the lately published Petitions 6 Edw. I. in Sir M. Hale's MS.

[y] See 9 Edw. II. c. i. One of the most particular forms of granting a corody, seems to be the following: "Corrodium ipsius Johannis
"erat tale, viz. pro se et duobus garcionibus, et camerâ, et stabulo in
"Abbatâ de Burgo. Ita videlicet quod Johannes, cum superioribus
"liberæ familiæ Abbatis de Burgo, et successorum suorum, in aulâ ipsius abbatis ad mensam declinaret, et garciones sui cum garcionibus
"ipsius abbatis admitterentur." A stipulation then follows, that, if *John* was ill, he might send for certain things out of the abbot's hall. Sparkes's Coll. p. 157.

from

from starving. The monasteries were therefore to subsist these annuitants during their lives, who, as they died off, left a vacant bed, if not an apartment, for the reception of the traveller. Besides this, provisions could not every where be procured [z]; and the religious houses had always such a provident care for themselves, that the addition of a few mouths was scarcely felt. The clergy however, now in full possession of their large estates, began to repine at this occasional inconvenience, and possibly, during the troubles in the late reign, they might have been overloaded with guests on their march from one part of the country to another. They therefore, by the first chapter of this law, procure a declaration, that no one is to lodge in their monastery without their consent, alledging, "*quils sont ci abates et impover*" "*que ils ne poient eux mesmes susteigner.*" It is believed, however, if it had been necessary to prove this allegation, that the evidence must have been offered to a committee in parliament very favourable to their interests.

Similar causes will always produce similar effects, and therefore we find that Phillippe le Bel made an ordinance, "*que les juges n'yront en eglises ou abbayes pour disner ou giser, sans grande cause ou occasion* [a];" by a canon also of Pope Boniface, in 1295, even the clergy were limited in the number of their attendants; for an archbishop is not permitted to have in his retinue above fifty officers, a bishop thirty, or an archdeacon seven: they are likewise enjoined not to travel with hounds or hawks.

[z] There were few or no markets to supply the country; and therefore it is another regulation of this chapter, that the religious houses shall not be obliged to *sell* their provisions. They were at this time the only inns, and were therefore treated as such; yet, by this part of the law, they endeavoured to put a stop to this their only use to society. By ch. lvi. of James the First of Scotland, no person is permitted to lodge at his friend's house, if there happened to be an inn for his reception.

[a] Ord. Royales, p. 1.

M

The

The next year a writ issued to the Abbot of Belieu, grounded on this chapter of Westminster the first [b].

C A P. XII.

PURVIEW est ensement, que les felons escries, et queux sont apertement de male fame, et ne se voilent mettre n'enqueste des felonies que l'on mette sur eux devant justices à le suit de roy, soyent mises en la prison forte et dure, come eux queux refusent estre al comen ley de la terre.] Lord Chief Justice Hale [c] says, that the punishment of pressing to death did not arise from this statute, but was anciently inflicted by the common law. The words are, that notorious felons, "*qui ne se voilent mettre en enquestes des felonies, soyent mis en la prison forte et dure.*" As this law therefore is so highly penal, I cannot think that judges, who have only tied the thumbs together of criminals, in order to oblige them to plead [d], can be justified under these words of the statute, though

[b] See Prynne's Records, vol. iii. p. 180.

[c] History of the Pleas of the Crown.

[d] It appears by the Sessions Papers, that this was practised at the Old-Baily in the reign of Queen Anne. In 1714, a prisoner's thumbs were thus tied at the same place, who then pleaded; and, in January 1720, William Spigget submitted in the same manner after the thumbs being tied *as usual*; and his accomplice Phillips was absolutely pressed for a considerable time, till he begged to stand on his trial. In April 1720, Mary Andrews continued so obstinate, that three whips were broken before she would plead. In December, 1721, Nathanael Haws suffered in the same manner, by squeezing his thumbs; after which he continued seven minutes under the press with 250 lb, and then submitted. Collections of Old-Baily Trials, which I have been favoured with the perusal of.

John Durant was also obliged to plead by tying his thumbs together very tight, during the mayoralty of Sir William Billers, in the year 1734. Mr. Baron Carter and M. Baron Thomson assisted at the Old-Baily during this Trial. See the Sessions Papers of that year.

their intentions have been merciful; especially as, whatever might have been the common law, this statute hath superseded it. *Prisone forte et dure* can mean nothing further, than, if the criminal will not submit to a trial, he shall be remanded to a most close and severe confinement. How is it possible then to include pressing to death, or any preparatory torture, under these words; especially as the felon, when convicted, had his benefit of clergy?

There is a pardon of the thirty-first year of Edward the Third[e], which proves beyond dispute, that what is contended for is the true meaning of the statute, and that nothing more was intended than a confinement without any nourishment, which was justified under the word *prisone dure*. “Rex omnibus, &c. “cum *Cecilia*, quæ fuit uxor *Johannis de Ryge-way*, nuper indictata “de morte viri sui, &c. pro eo quod se tenuit *mutam et ad pœnam* “*suam* exstitit adjudicata *ut dicitur*, in quâ sine cibo et potu in “*arctâ prisonâ* per quadraginta dies vitam sustinuit viâ mira- “culi, et contra naturæ ordinem; nos eâ de causâ pietate “moti perdonavimus,” &c. This pardon was granted above seventy years after the present statute became a law, and consequently proves, what to that time had been, the uniform exposition of this clause.

Notwithstanding Lord Chief Justice Hale asserts, that this punishment was inflicted by the common law, Bracton takes no notice of it, who is supposed to have lived in the preceding reign. Britton, on the other hand, who is generally agreed to have written after this statute[f], seems to allude to it, under the word

[e] Rymer, in that year.

[f] Sir Edward Coke indeed conjectures that Britton's work might have appeared in the fifth year of the king's reign, which is two years after this statute. That learned antiquary, Bishop Nicolson, supposes the author to have written in the reign of Edward the Second. Selden, however, denies Britton was the author. See *Dissertatio ad Fletam*, c. 2.

penance; “*si les felons ne se voient acquitter, se soient mis à leur penance jusqu’ à tant quils ne pledent.*” The statute says, that only notorious felons are to be thus confined; and therefore in an appeal, where the supposed guilt was not so strongly proved as when there is an indictment found by a grand jury, the prisoner was not subjected to this punishment.

The first question, with regard to the *peine forte et dure* (a word substituted instead of *prison forte et dure*) is in the Year Book of 8 Hen. IV [g], where the form of the judgment is first given. The Marshal of the King’s Bench is ordered to put the criminals into “*diverses maisons basses et estoppes, que ils gisent par la terre tous nuds forsque leurs braces, que il mettroit sur chascun d’eux tant de fer et poids quils puissent porter et plus, issint quils ne se puissent lever, et quils naver ascun manger, ne boire, si non le plus pier pain quil puissent trouver, et de leau plus pres al gaole (excepte eau courant) et que le jour quils ont pain quil nayment de leau, et e contra, et quils gisent issint tantqu’ils furent morts.*” Notwithstanding this conclusion of *tantqu’ils furent morts*, we find in the same case of 8 Henry IV [b], that one of the judges says, the criminal may live many years, after having suffered it. The next case in the Year Books, which relates to the *peine forte et dure*, is the 14 Edw. IV. A criminal, on an appeal for murder, pleaded *not guilty*; and upon being asked, according to the common form, how he would be tried [i], would make no further

[g] T. Mich. pl. 2.

[b] T. Tr. pl. 10.

[i] I cannot here help observing, that the common question asked the criminal, viz. *Culprit, how wilt thou be tried?* is improperly answered, *By God and my country*. It originally must have been, *By God or my country*, i. e. either by *ordeal* or by *Jury*; for the question asked, supposes an option in the prisoner, and the answer is meant to assert his innocence, by declining neither sort of trial.

answer:

answer:: upon this, the court doubted whether he should be hanged, or ordered to suffer the *peine forte et dure*. Though all the judges were met in the Exchequer Chamber upon this doubt, it does not appear that it was finally decided, notwithstanding the clause in this statute was under their consideration, as the report of the case concludes by citing it.

The form of this judgment seems to have been never strictly adhered to, as that which hath been above cited differs, in some particulars, from the sentence in Raftal's Entries, and consisting of such very minute directions, could not propably have been at once settled [k]. There is likewise, in Babington's *Advice to Grand Jurors*, another form of this sentence, which varies in this, that the criminal is to drink but three times in a day, which must be a great addition to the torment, as the agony probably must bring on a violent thirst and fever, as happens also to those who are broken on the wheel. Hollinshead likewise takes notice of another circumstance in the punishment as used in his time, viz. that the back of the criminal was placed upon a sharp stone[l]: other precedents mention the tying his arms and legs with cords fastened at different parts of the prison, and extending the limbs as far as they could be stretched.

[k] See Stanford's Pleas of the Crown, p. 150, & seq.

[l] Vol. i. p. 135. In the year 1659, Major Strangeways was tried before Lord Chief Justice Glyn for the murder of Mr. John Fussel, and, refusing to plead, was pressed to death.

By the account of this execution, which is added at the end of the printed trial, he died in about eight minutes, many people in the press-yard casting stones upon him to hasten his death. It should seem also from the description of the press, that it was brought nearly to a point where it touched his breast. It is stated likewise to have been usual to put a sharp piece of wood under the criminal, which might meet the upper part of the rack in the sufferer's body. See the *Unhappy Marksman*, in the 4th Vol. of the Harleian Miscellany, p. 10.

From

From this it appears that there is no settled sentence of this terrible judgement, which is contrary to a fundamental principle of the criminal law of England in capital offences; and no one form (at least that I have happened to meet with) takes notice of the preparatory torture of tying the thumbs with whipcords, which, though mercifully intended to prevent the more severe punishment, by obliging the prisoner to plead, cannot, it should seem, be justified. As it is very unusual for criminals to stand mute on their trials in more modern days, and it was not unfrequent if we go some centuries back in the English History, it may not be improper to observe, that the occasion of it's being then more common, was to prevent forfeitures, and involving perhaps innocent children in the consequence of the parent's guilt. These forfeitures only accrued upon Judgment of *life and limb*, and, to the disgrace of the crown, were too frequently levied with the utmost rigour. The sentence, however, hath continued to be put in execution till the late act of parliament most properly abolished it. I have already mentioned an instance during the reign of Queen Anne, and I am furnished with two others by learned correspondents during the reign of the late king. One of these happened at the Suffex assises under Baron Thomson, and the other at Cambridge in 1741, when Baron Carter was the judge.

I should conceive upon the whole, that the words in the present statute, which have occasioned these observations, viz. *prisonne forte et dure*, have been misconstrued, by substituting in the room of *prisonne*, the word *peyne*. The record cited from Rymer proves beyond a possibility of doubt, that, long after this law, the punishment was merely imprisonment, and an injunction to the officers, in whose custody the criminal was, not to provide him with any nourishment. I should imagine, that the alteration in this sentence, by the different tortures afterwards used, arose from justices in eyre, and justices of gaol-delivery, not staying

staying above two or three days in a county town, who therefore could not wait for this tedious method of forcing the criminal to plead; as the record from Rymer shews, that, in the instance already observed upon, the prisoner had been forty days in close confinement. It seems likewise clear, that, whatever this punishment might have been by the common law, this statute hath superseded it; and it is a presumption, against even so great authorities as Sir Edward Coke, and Lord Chief Justice Hale, that there was no such sentence by the common law, as it is admitted that a traitor cannot receive this punishment, because the words of the statute confine it to the case of felons; the argument is also very strong, that, if felons were subjected to this sentence, traitors would still less have escaped it.

After all, the having recourse to this severity, when the criminal stands mute and will not plead, is very unnecessary. The common reason given, that the prisoner must acknowledge the jurisdiction of the court, seems not to have much weight. If the judge knows that he hath the power to try him, what signifies this forced acknowledgement of his jurisdiction [n]? It would be much more reasonable to adopt the practice of the Scotch law, "if the criminal stands mute and will not plead, the

[n] Lord Bacon, in his *Apophtegms*, mentions a Welshman's having supposed the judge to be a fortune-teller, from the ceremony of the criminal's holding up his hand at the bar.

Fynes Morrison informs us (in his *Precepts to Travellers*), that this custom of holding up the hand is always observed in France when a witness is sworn; part iii. p. 30. They have either borrowed this from us, or we from them, though we differ in the use of it. The ceremony of the prisoner's holding up his hand, after being arraigned, seems to have been introduced to distinguish him from the croud which stands round him. Mr. Eden likewise, in the *Principles of Penal Law*, p. 167, very properly observes upon the impropriety of making the criminal kneel, as if the acquittal did not arise from the merits of his case, but the favour of the judge.

" trial

“trial proceeds as usual, and it is left to the criminal to manage his own defence as he shall think proper [o].”

As I have had occasion to mention the different tortures to which the criminal hath been subjected by the varying the punishment of the *peyne forte et dure*, I shall here endeavour to prove what I have asserted at the end of the comment on Magna Charta, that the rack, with all its attendant terrors, was formerly not unknown in this country *. Torture was used by the ancient Germans, from whom we are supposed to have derived our laws [p]; and therefore this horrid practice in most parts of Europe does not arise perhaps entirely from their having adopted the civil law. The Digests were discovered at Amalfi, in the year 1137; and, though less of the Roman law hath been introduced into that of England [q] than in any other country of Europe, yet certain parts of it have, undoubtedly, been incorporated. The beginning of the Preface to Glanvil is most clearly an imitation of the Introduction to Justinian's Institutes; and the Italian clergy, who possessed the best benefices in the kingdom, must be supposed to have never lost an opportunity of interweaving, from time to time, parts of the Roman into our municipal law [r]. The denying a felon to make his defence by an

[o] Innes's Sum. View of the Scotch Law.

* Sir Edward Coke says, that torture is forbid under the words “*aliquo modo destruatur*” of Magna Charta. 2 Inst. 48.

[p] Wachter's Gloss. Germ.

[q] Duck asserts, that the Roman law prevailed in England during the reign of Domitian, and some of his successors. In justice to the authority of this writer, I cannot but mention that Giannone and other the most celebrated Civilians, style him their Coryphæus: we are too apt in this country to defer to foreign authors, as the Roman law is so little attended to, or practised in England. Wood, in his *Athenæ Oxonienses*, however, asserts, that Dr. Gerarde Langbaine's labours in this work were so great, that he deserved to be styled co-author of it. *Ath. Oxon* vol. ii. p. 67.

[r] The great Papinian is supposed to have presided on the bench at York. It must be recollected likewise, that Richard the First, and Edward the First, were some years abroad in their expeditions to the Holy Land.

We

an advocate [s], and the not permitting his witnesses to be examined upon oath [t], till the late statute, seems to have been borrowed from the Roman law [u], which is indeed still more severe

quæ ubi est Statute?
1 Ann. St. 2. c. 9

We know that Richard either made or adopted the laws of Oleron; nor is it improbable, that Edward might have likewise desired to introduce any other beneficial regulations which he had observed during his absence from England. Bracton, who wrote in the time of Henry the Third, *De legibus et consuetudinibus Angliæ*, in the second chapter of his second book hath the following passage (as well as many others to be found in different parts of his work) from the Institutes of Justinian: "Hæc eadem species accessionis per humanæ curæ sollicitudinem potest affigari in literis. Literæ enim licet sint aureæ, perinde chartis membranisque cedunt, sicut ea solo cedere dicuntur, quæ ædificantur vel inscribuntur. Sed in picturis contrarium erit, ridiculosum enim esset preciosam picturam per accessionem cedere vilissimæ tabulæ." These are the words and doctrine of Justinian in his Institutes; but it need hardly be said, that painting was not at this time arrived to such perfection in England, as to make it necessary to lay down distinctions with regard to it in the chapter of a Law-book. Bracton, besides this, eternally uses the names of *Titius* and *Sempronius*, instead of the *A.* and *B.* of an English lawyer.

[s] Menage mentions, that the French courts of Justice sometimes appoint advocates to undertake the causes of criminals; he also tells a story of a pick-pocket being advised by his counsel to run away, as he had no other defence to make. *Menagiana*, p. 4.

[t] The Attorney General's power of filing informations *ex officio* seems also to be borrowed from the civil law, where there is always a *partie publique*, or public prosecutor.

[u] Edward the First sent for *Accursius*, a famous reader on the Roman law, though it does not seem clear that he ever was in England: the invitation shews, however, that the study of the civil law was at that time attended to. *Selden's Works*, vol. ii. p. 197. London, 1726. The son of this *Accursius* (who was likewise a doctor of laws) was established by Edward the First at Oxford. *Ibid.*

Duck, in his treatise *De Auth. Jur. Civ.* says, that he had conversation

severe against the criminal, as he is not permitted to produce any witnesses in his favour; and Montesquieu [*w*] gives this as a reason why perjury is a capital offence in France, though not in England. As there is a very curious paper in the first volume of the Journals of the House of Commons, which relates to this practice of the Civil law, I shall here insert it [*x*].

Having

with Noy (a great lawyer *, though of a bad political bias) with regard to the civil law's having prevailed in England; and that it was agreed, the *Register of writs*, known to be of the greatest authority in our municipal law, was drawn by men thoroughly versed in that of the Romans. If this collection was made by the Masters in Chancery, it is some confirmation of what Strahan informs us, that the reason of their attendance on the House of Lords was originally to be consulted upon points of civil law. Sir Thomas Smith likewise, in his Commonwealth of England, says, that, in the beginning of the reign of Queen Elizabeth, there were but six Masters in Chancery, who assist to shew what is the equity of the civil law, and what is conscience, P. 54. 58. [There is amongst Mr. Peryt's manuscripts a very complete treatise on the office of a Master in Chancery. See vol. xiii.]

[*w*] *Esprit des Loix*. Voltaire, in his Commentary on the Italian treatise of the Marquis *Beccaria*, lately published, speaks thus of the French practice with regard to the examination of witnesses in secret: "Chez nous tout se fait secretement. Un seul juge, avec son greffier, entend chaque temoin l'un après l'autre. Cette pratique etablie par François I^{er} fut autorisée par les commissaires qui redigerent l'ordonnance de Louis XIV, en 1670. Une meprise seule en fut le cause;" p. 109. Paris, 12^mo, 1766. He then explains from *Bernier*, that a passage in the civil law had been misunderstood, injoining witnesses "*intrare judicii secretum*;" which only signifies that they should enter the judge's private chamber, but does not direct that they should be secretly examined. This is at least Voltaire's interpretation of the passage in the civil law abovementioned.

[*x*]

"*Die Jovis, 4^o Junii, 1607.*

"A paper was delivered to, and read by, Mr. Speaker, declaring the

* "Noy pleading, no man doubts his cause;

"Nor questions verses, set by *Lawes*."

WALLER.

"manner

Having thus endeavoured to shew that some parts of our law may have probably been borrowed from that of the Romans, I shall

“manner of proceeding in Scotland for point of testimony, upon trials in
“criminal cases for satisfaction of some doubts.

“In Scotland, in civil causes before the civil judges, witnesses are admitted for probation, but that only in favour of the persuer; for the defender would prove against the libel, if he had the benefit of witnesses, which is altogether unlawful. And therefore in many civil actions, the defendant will press by all means, either by another cross libel, or by one trick or another, to change the nature of his cause from a defender to a persuer.

“In criminal causes, by the civil law, there is no jury called upon life and death; and therefore the judges admit witnesses in favour of the persuer, but none in favour of the defender: because in all causes (either criminal or civil) no man can be admitted to prove the contrary of his own accusation, for it is his part who relevantly alledges the same to prove it. As if *A.* accused *B.* for breaking his stable, and stealing his horse such an hour of the night; the persuer may be well admitted to prove what he hath alledged, but the defendant can never be admitted to prove that he was *alibi* at that time, for that would be contrary to the libel, and therefore most unformal. In Scotland we are not governed by the civil law, but *ordanes* (ordinaries probably), and juries are to pass upon life and death much the same as here; which jury, as it comes from the neighbourhood where the fact was committed, is presumed to know much of their own knowledge, and therefore they are not bound to examine any witnesses, except they choose to do it on the part of the persuer; but this is not *lawful to be done in favour of the defendant* *. It is of truth, the judge may either privately beforehand examine *ex officio* such witnesses as the party persuer will offer to him; and then, when the jury is publicly called, he will cause these depositions to be read, and likewise examine any witnesses which the persuer shall then desire, but *never in favour of the defender*.” This paper was delivered to the Speaker, with regard to a trial of one Barrett in Scotland; and the further proceedings thereupon may be seen in the

* A grand jury in England only examines witnesses on the part of the prosecutor.

shall now mention the actual proofs of torture having been formerly, at least in some instances, used in this country. Fuller [y] informs us, that one Hawkins suffered this punishment in the reign of Henry the Sixth, in order to extort evidence from him; and Sir Edward Coke [z], in the case of Lady Shrewsbury, says, that *the nobility of England are not subject to torture* in crimine læsæ majestatis; which seems to admit, that in other crimes they were liable to it, or otherwise affords a strong inference, that persons of a lower rank might in treason be subject to this sentence [a]. King James, in his Works, mentions, that the rack was shewn to Guy Fawkes during his examination; and yet this attempt of procuring evidence is not taken notice of by any historian or lawyer of the times, though every circumstance relative to the powder-plot must have been most publicly known. Upon the murder of the duke of Buckingham by Felton, the judges were asked whether he could be tortured in order to extort a confession [b]? They answered indeed to their honour in the negative; but their being thus consulted shews, that, in the Journals, vol. i. p. 378, 379. The king sent a message to the house, declaring it to be *his gracious opinion*, that no one by the law of Scotland could take upon himself *patrocinium latrocinii*.

[y] Worthies, p. 317.

[z] 12th Report.

[a] Lord Coke was Attorney General at the trial of the Earls of Essex and Southampton, and he highly extols the clemency of Queen Elizabeth, who had neither used torture against the accomplices nor witnesses. State Trials, vol. i. For other instances of the use of torture in England, I shall refer to some observations on 27 Hen. VIII. cap. iv.

[b] Rushw. Coll. When Felton was in the Tower of London, he was at one time threatened by Sir Edward Sackville, Earl of Dorset, that he should be forced upon the rack to confess who were privy with him, and consenting to the Duke's death. Appendix to that Volume of Hearne's Tracts, which begins with the History of Richard the Second, p. 381. Laud also menaced Felton with the rack. Whitelock, p. 11. and other instances might be added.

apprehension of some of the king's counsellors, they might have inflicted this punishment. It is not pretended by this, that the instances were frequent [c]; and fortunately this most horrid practice hath been discontinued, so that there cannot be the least legal pretence ever to revive it. Torture indeed by no means prevails so universally in the other countries of Europe as is generally apprehended: there are exprefs laws against it both in Navarre and Biscay, though in Biscay it hath of late been permitted in treason and heresy [d]. There are also many regulations by the ordinances of the state of Lucca, to prevent its ever being inflicted a second time, but upon fresh as well as stronger proofs; and if the executioner introduces any new severity, during

[c] It may likewise perhaps surprize the reader to find, by the 39th Eliz. cap. iv. published at length by Rastal, that the *gallies of this realm* seem to have been not an unusual punishment; and Lord Coke mentions it in his 3d Inst. cap. 40. without taking notice of its being uncommon. In the forty-second year of Queen Elizabeth, a commission issued, entitled, "De commissione speciali pro condemnatis ad galeas transferendis." See Rymer, vol. vii. part ii. p. 36. "In Tower street, betwixt Hart-lane and Church-lane, was in times passed a *Galley-Row*, because gallie men dwelt there, whence it may be inferred, "that gallies were a kind of shipping not unknown in time past." Howel's Londinopolis, p. 49. There is also a quay between Billingsgate and the Tower, which is styled Galley Quay. They were however so much disused by the time of Charles the First, that Guillim speaks of them as confined to the Mediterranean. What sort of ships or vessels these gallies were, I do not pretend to determine; the gallies of the Mediterranean, to which the French criminals are condemned, are not proper for our seas. Harrison (in his description of Britayne) mentions three gallies, which constituted in the reign of Queen Elizabeth part of the Royal Navy, when at the same time the larger ships were but nineteen; the names of them were, the *Spedewell*, the *Tryrybt*, and the *Black Galley*, p. 87. A. Buchanan also describes gallies in the Scotch seas, which he says were built in the Genoese manner.

[d] Fuer de Viscaya, p. 20 and 66.

the

the examination of the criminal, he is punished with death [e]. It is used in China, and in most parts of Asia [f]: the act of union hath forbidden it in Scotland.

C A P. XXXIV.

POUR ceo que plusours sont souvent trove en courte controveurs, dont discorde ou manner de discorde ad este souvent entre le Roy, et son peuple, ou ascun hauts hommes de son royaume: est defendu pur le damage que ad este, et uncore en purreit avenir, que desore en avant nul ne soit si hardi de dire ou de counter nul faux novel, ou controveure, dont nul discorde ou manere de discord, ou de sclandre, puisse surdre entre le roi et son peceple, ou les hauts hommes de son royaume, et qui le fra, soit pris, et detenus en prisone jesques ataunt qil eit trove en courte, celui dont le poeple [la parole] sera mové.] Scandal and defamation [g] must at this time have been chiefly propagated by conversation, as few could read, much less write. The reverend and ingenious Dr. Percy [h] hath given us a satyre or libel upon Richard, king of the Romans, and brother to Henry the Third, which was written by one of the adherents to Simon de Montford, earl of Leicester. This ballad, Dr. Percy says, affords a curious

[e] Stat. Lucc. l. iv. c. xl. Luccæ, 1539, Folio.

[f] Du Halde, vol. ii. p. 62. Hague edit.

[g] This offence is styled *leasing-making* by the law of Scotland. Forbes's Inst. vol. ii. p. 66. A law of Robert the First of that kingdom makes use of almost the same terms with the present statute. It is forbidden, "that no man be an inventor of narrations or rumours by which discord may arise between the king and his people." See ch. xx. amongst the acts of that king. "Legibus islandicis antiquioribus et recentioribus sancitum est ne scaldus quispiam infami Suethorum reges lacefferet carmine." Biorner, in Tref. to his Northern Stories. Stockholm, 1737. Folio. By the ordinances of Sicily, a libeller was punished with death. Pragm. Regni Sicil. vol. i. p. 246. As he is also under certain circumstances by a code of laws, published at Turin in 1723.

[h] In his curious Collection of ancient Ballads.

specimen of the liberty assumed by the good people of this land, of abusing their kings and princes at pleasure. As the libel (by a circumstance) is fixed to have been written in the year 1265, which was but ten years before the passing of the present statute, it is not improbable, that it might have occasioned this part of the law. Be this as it may, we do not find much in the Year Books, or other old Reporters, with regard to this offence, till the great case, entitled, *κατ' ἐξοχην, de libellis famosis* [i] (which is the foundation of what hath since been considered as law with respect to libels), was determined in the third year of King James the First, by which time printing began to be tolerably cheap.

As every thing which relates to the publication of what may be deemed a libel is of so interesting a nature to the liberty of the subject, ever so closely connected with the liberty of the press, I hope I may be indulged in some few observations upon the doctrine delivered in that case, and the particular circumstances which might occasion an extraordinary zeal and warmth in the court. The libel then condemned was a satyrical ballad [k] (at least it is stated to be a composition in metre) upon an arch-

[i] Coke's 5th Report.

[k] Most of the libels at this time were ballads :

“ a divulged shame,

“ Traduced by odious ballads.”

Shakespeare's *All's well, that ends well*.

Sir David Dalrymple, in his account of the Provincial Councils of the Scottish clergy, gives us the following canon, in 1549, against ballads ; “ Ut unusquisque ordinarius intra suam diœcesin perquirat qui apud se detinent aliquos libros rythmorum seu cantilenarum vulgarium; seu “ famosos libellos,” &c. p. 31. It appears likewise, by the Journals of the House of Lords, that a bill was preferred in the 4 and 5 Ph. and Mar. to prevent printing books and *ballads* without licence. Journals, November 12, 1557. See also the same Journals, 30 January, 1580; and 12 and 16 December, 1585.

bishop

bishop of Canterbury, who was dead, and likewise his successor. A primate of England, in more modern times, would probably have only laughed at it; but the then archbishop, under pretence of the insult upon the memory of his predecessor, brought the *confitentem reum* before that English Inquisition the Star-chamber. The archbishop was the first judge, from his rank at least, in this tyrannical court, and therefore an insult upon the president could not but excite their warmest indignation. As the libeller is stated to have confessed both the writing, and publication, the only question before the court must have been what fine or punishment they should inflict. The judges however were determined to lay down general rules, in order to suppress this growing evil, some of which seem either to be extrajudicial, or not to be maintained; and one of which Lord Coke himself contradicted upon another occasion.

The first rule is, *that if the libel is against a magistrate, it is a greater offence than against a private person.* I do not mean to controvert the reason upon which this rule is grounded; but it was extrajudicial, as the archbishop of Canterbury could not properly be deemed a magistrate. If, indeed, his seat in the Star-chamber is supposed to have given him a temporal office, it must be recollected, that he attended there *pro salute animæ* of the criminals.

The next rule was not extrajudicial, but can never be supported to the extent in which it is delivered, without a limitation of time. The rule is, that, if the person libelled is dead, when the defamation is published, the offender is equally punishable, as it may provoke the friends and relations of the deceased to revenge: and there is something very quaint in what follows; "That if the dead person libelled is a *magistrate*, it is a *reflexion* on government, which never dies [1]."

The

[1] It appears by Wraynham's Trial, 16 Jam. I. that Sir Edward Coke plumed himself much upon the having introduced this second rule as law.

"My

The third rule is, that it does not signify, whether the libel is true or not. This rule in the first place is extrajudicial: as the criminal confessed his offence, it is impossible, that before this terrible court he could have insisted upon having asserted nothing which was not true: this would have prevented his only chance for mercy in an entire and implicit submission after a full confession. The propriety indeed of this rule hath been adopted with reason by more modern determinations; but it is remarkable, that Sir Edward Coke himself, in the case of Lake and Hutton [m], is said to have laid down the contrary doctrine.

The fourth rule is, that a person may be guilty of a libel by drawing a ridiculous picture, or by raising a gallows opposite to a house: both these *dicta* are most clearly extrajudicial, and it is much doubted whether there ever was such a prosecution. During the reign of Queen Mary, however, prints were circulated, which represented her as meagre and deformed, as also the Spaniards sucking her [n]. Queen Elizabeth likewise forbid, by proclamation, any portrait being drawn for her, but by those whom she should authorize [o].

The last rule is, that if a libel is found, and it relates to a private person, it must be either burnt, or delivered to a magistrate; and, if it defames a public person, it must *not be burnt*, but delivered to a magistrate; which may be said, not only to be extrajudicial, but absolutely impossible to be carried into execution.

“ My Lord, you know that the slander of a dead man is punishable in this
 “ court (viz. the Star-chamber), as *Lewis Pickering* is able to tell you,
 “ whom I caused here to be censured for a slander against an *Archbishop*
 “ *that was dead*; for justice lives, though the party be dead, and such
 “ slanders do wronge the living posterity, and alliance of the man de-
 “ ceased.” St. Tr. vol. vii. p. 108.

[m] Reported by Hobart, p. 252.

[n] Life of Sir Thomas Pope, p. 58.

[o] Archaeologia, vol. ii.

The reason of this, and the other questionable doctrines contained in this case, arises from every one of these rules being borrowed from the Civil law [p], which, taking place before the invention of printing, made this last regulation at that time practicable; no one who was ever in a coffee-house will suppose it to be so at present.

Notwithstanding the observations which I have here taken the liberty to make on this very extraordinary case, I cannot conclude them without expressing my detestation of libels, which cannot be too much discouraged in a well-regulated government; nor is such restraint wanted by the Common Law, if the

[p] See Cod. ix. 36. The case is therefore entitled by Lord Coke, who was no great civil Lawyer, *De libellis famosis* *, which is the title of the chapter in the Roman law; and what severity must we not expect from a country in which, by the twelve tables in the time of the Decemvirs, a libeller was punished with death? [“ Si quis carmen occentâffet quod alteri flagitium faxit, capital esto.”] I should conceive that the doctrine insisted upon in this case had alarmed the famous Dr. Donne, who had received a legal education, and had been secretary to Lord Chancellor Ellesmere, as from a letter of his written at that time I have copied the following passage: “ There be many cases where a man may do his country good, and service, by libelling; for where a man is either too great, or his vices too general, to be brought under a judiciary accusation, there is no way but the extraordinary method of accusation, and I have heard that nothing hath souped, and allayed, the D. of Lerma, so much as the frequent libels made upon him. *Sealed letters in the Star-chamber* have now-a-days been judged Libels.” Dr. Donne’s Letters, p. 92. 4^{to}.

* Hence some of the Byzantine historians have formed the term of *φάμνος τομος*. See N. Georgii Pachymeris Hist. Andronici, l. vii. c. v. In process of time, the word *λιβελλος* was also made use of, though Du Cange hath no such article in his Dictionary *Infimæ Græcitatibus*, *τὸς δὲ λιβέλλος, ὅς κατ’ ἀλλήλων τινὲς ἐξιδωκασί, πυρὶ καίκαυσιν*. Theophanis Chronographia, p. 14, inter Byz. Script. Venet. 1729.

principles laid down in this *Star-chamber* decision are not resorted to [q].

C A P. XXXVIII.

PURCEO que ascuns gens de la terre doutent meyns faire faux serment, que faire ne deussent, per que mults des gens sont desinherités,

[q] Diogenes Laertius, in his life of Anacharsis the Scythian, mentions, that this philosopher, whilst at Athens, used to express his surprize, Πως οἱ Ἕλληνες νομοθετεῖς καὶ αὐτῶν ὑβρίζοντων, τὰς ἀθλητὰς τιμῶσιν ἐπὶ τῷ τυπτεῖν ἀλλήλους.

Hobbes is therefore mistaken when he asserts, “that there was no law
“amongst the Greeks against contumely by words, and gesture, they sup-
“posing any resentment for such contumely to arise from the pusillani-
“mity of him who is offended by it.” *Leviathan*, c. xxvii.

The *Greenlanders* generally shew their resentment for injuries by giving their adversaries fair notice, that they will recite a libel against them on such a day to a numerous audience; and it is reckoned a want of spirit if the antagonist does not attend, and give a very smart answer. *Crantz's Greenland*, vol. i. p. 178. London, 1766.

An ordinance of parliament passed the House of Lords on the 30th of September, 1647, that no person shall make, write, print, sell, publish or utter, or cause to be made, &c. any book, pamphlet, treatise, ballad, libel, sheet, or sheets, of news whatsoever (except the same be licensed by both or either house of parliament), under penalty of 40*s.* and an imprisonment not exceeding forty days, if he cannot pay it; if a printer, he is to pay a fine of only 20*s.* or suffer twenty days imprisonment, and likewise to have his press and implements of imprinting broken in pieces. The bookseller, or stationer, to pay 10*s.* or suffer ten days imprisonment. And, lastly, the hawker, pedlar, or ballad-singer, to forfeit all his printed papers exposed to sale, and to be whipt as a common rogue in the parish where he shall be apprehended. See *Journals of the House of Lords*, Sept. 16, 1647.

By another part of the same ordinance, all constables, headboroughs, &c. are authorized and required to enter into any such house, or shop, where they shall have good cause to suspect any such libels are printed, sold, or uttered, and to bring them, together with their printing materials, before the proper magistrate.

et perdent leur droite: purvu est, que de formes, le roi (de son office [r]) durra atteint sur enquestes en pleint de terre, ou de franchise, ou de chose que touche frank tenement.] This chapter of the statute lays an obligation on the king, or rather the king's courts, to grant a writ of attaint against a jury, who have given a verdict contrary to their oaths. The translation of this part of the statute makes it rather ridiculous, than a law carrying its proper terrors against so heinous an offence: "Forasmuch as certain
 "people of this realm doubt very little to make a false oath
 " (*which they ought not to do*)."

It is generally agreed, that no prosecution by attaint hath been carried on against a jury for the last three hundred years: this arises partly from the more modern practice of granting new trials, and partly from the great difficulty there is in convicting, as the jury may give their verdict upon what is known to themselves, though it hath not appeared in evidence during the course of the trial. It is indeed said, that a juror, having such private knowledge of a fact, should disclose it in open court; but what signifies often the mere advice of a judge, which cannot be enforced [s]? Attaints were so frequently brought, even so late as the

[r] *De son office* should be translated *of right*, and *not of his office*; *durra*, which follows, is put corruptly for *donera*.

[s] It should seem to have been understood in the time of Henry the Third, to have been the duty of the judge to control the verdict of the jury: "Sed cum ad iudicem pertineat iustum proferre iudicium, oportebit
 " eum *diligenter examinare* si dicta juratorum in se veritatem contineant, et
 " si eorum iustum si iudicium, *vel fatuum*; *ne si contingat iudicem eorum*
 " *dicta sequi, et eorum iudicium, ita falsum faciat iudicium, et fatuum.*"
 Bract. lib. iv. cap. xix. Lord Clarendon, in his Survey of Hobbes's Leviathan, declares himself most explicitly to be of opinion, that the jury are not to judge of the law. p. 129. Hobbes lays down the contrary, in his Dialogue between a Lawyer and a Philosopher, Works, p. 625. As also in his Leviathan, c. xxv. See this point, however, very ably discussed in the lately-printed Law Dialogues.

the reign of Henry the Sixth, that Fortescue [1] makes it one of his principal arguments for the trial by jury, that each of them, in case of a false verdict, is liable to have their lands and tenements seized into the king's hands, as also their wives and children thrown out of their houses. It may therefore deserve consideration, whether this method of punishment being now totally disused may not have occasioned a most material alteration, and deviation from the principles upon which juries were originally instituted. Sir Thomas Smith (who wrote his Commonwealth of England in the year 1565) gives us this account of attainments being then seldom heard of; "because gentlemen will not meet
 "to slander and deface the honest yeomen their neighbours, so
 "that of a long time they had rather pay a fine, than to appear
 "and make the inquest: and even when they have appeared,
 "and attainted the yeoman, if, before sentence is given (which
 "is generally for a time deferred), the parties agree, or either of
 "them dies, the attainment ceaseth." He likewise mentions, that, before the statute of Henry the Eighth, which dispensed with the forfeiture of lands by those who were convicted in an attainment, this was an additional reason for discountenancing these prosecutions [u].

The attainment was tried by twenty-four jurors, of double the substance with the first jury; and it is to be observed, that it lay only in civil cases, either by the common law, or by this statute. The reason of which seems to have been grounded upon the

It appears by *Stiernhook*, that the *nembda* (or jury), by the ancient ordinances of Sweden, was to determine only questions of fact, though in process of time, they decided points of law also: "De consuetudine
 "hodiè vero *nembda* ex officio judicis participat, confusis enim officiis
 "simul et de jure et de facto cognoscunt." De jure Sueonum vetusto, c. v. p. 61.

[1] In his treatise De laudibus legum Angliæ.

[u] P. 102, & seq. We find frequent mention of the attainment in the ancient law of Scotland. See Reg. Maj.

strong

strong presumption, that no jury would condemn a criminal contrary to the evidence, and that it would be inconsistent with principles of liberty, to permit the crown, when it might intend oppression, to call in question a verdict of acquittal. It is for the same reason, when a crime is prosecuted by appeal, the remedy of a private person, and not by indictment which is the suit of the crown, that there is no intervention of a grand jury to find the bill. Happily for this country, since that glorious era the Revolution, the kings of England have only prosecuted as fathers of their country, when punishment hath been necessary for the safety of the whole; but when we look into trials during preceding reigns, we cannot but revere the wise and noble constitution, established by our ancestors, against the vindictive prosecutions of a *Tudor*, or a *Stewart*.

EXTENTA

EXTENTA MANERII,

4 Edw. I. A. D. 1276.

THIS Statute hath not been taken notice of by any of our Historians, though it seems to have been made with the same view which occasioned the Domesday Survey, in the reign of William the First. It is most certainly no act of parliament in any sense of the word, but is merely a set of instructions to the King's *Extender* [w] with regard to what he shall inquire into, and upon what heads and particulars he is to make his report. The crown seems to have had two things chiefly in view, the taxation of the subject, and the power or force to resist such an assessment: the first direction is therefore, "*Inquirendum est de castris, et aliis edificiis fossatis circumdatis.*" The articles of inquiry, which follow after this, relate to most minute particulars with regard to every man's estate [x]: "*De pannagio, et herbagio, melle, oleribus, et omnibus aliis exitibus vivariorum, mariscorum, morarum, bruerarum, turbariorum, et vastorum, quantum valeant per annum.*" This law, made with the views I have before suggested, was followed, in two years, by the oppressive statute of *quo warranto*. The occasion of both probably took its rise from Edward's want of treasure to carry on the wars which he now meditated against Lewellin prince of North-Wales. It may perhaps be imagined, that such expeditions did not require

[w] Du Cange says, the *Extensor* is the same with the *Æstimator Publicus*. Thus likewise Bracton, "*Officium extensorum est in rebus hæreditariis extendendis, et in summâ, omnia quæ veniunt de corpore manerii, et e quibus commodum evenire posset.*"

[x] This proclamation was never carried into execution; otherwise the complaints occasioned by it must have appeared in the Monkish Historians.

great

great subsidies, or taxes; but it was not merely the common expences of paying, or subsisting an army, which exhausted the royal coffers: Edward not only conquered, but was determined to keep possession of what he had acquired by his army. I shall have occasion to observe upon the statute of Rutland, made in the tenth year of his reign, that he was above a year in North-Wales without ever leaving it, and, during that residence in the country, probably completed the castles of Carnarvon, Beaumaris, and Conway, which shew, by the grandeur of their venerable ruins, that the expence of such fortifications would alarm in an estimate from a modern Board of Ordnance [y].

This statute of instructions to the *Extender* is followed by another of the same kind to the Coroner. This officer is, in the Scotch law, termed the *crowner*, in the manner that the common people now pronounce the word. Both *coroner* and *crowner* most evidently are so called from this officer's having connufance

[y] Giraldus Cambrensis, in his *Topographia Hiberniæ*, mentions, that, in the time of Henry the Second, there was but one church in Ireland built of stone; I should therefore think, that Edward the First must have planned these magnificent castles from some which he had seen in his expedition to the Holy Land. *England* at that time had not furnished any such models, nor is it believed any country in Europe. The army of the Crusades was infinitely numerous, and must have been occasionally employed in building fortifications. "Rex igitur Anglorum (sc. Ricardus) cum exercitu suo pergens Ascalonam et muros ejus per totam hyemem cum magnis expensis et labore reparare non cessavit." *Gesta Dei per Francos*, vol. ii. p. 1125. See also, in the same collection of Historians, the accounts of the fortifications of the towns of Antioch and Jerusalem. There is, in the first volume of *Le Brun's Travels*, a representation of the walls of *Cobm* in *Persia*, which almost exactly resemble those of the town of Conway in Carnarvonshire. It can hardly be contended, that this style of military architecture is confined to Persia, as it may have been borrowed from the neighbourhood of Jerusalem, or that part of Asia have adopted it from Persia. As Le Brun was a good painter, his representation may be depended upon as accurate and faithful.

only

only *de placitis coronam tangentibus*. With this most obvious etymology, it may not perhaps be deemed arrogant to differ even from the great Lord Bacon, who derives it *a coronâ populi*; the crowd attending in a circle is by no means peculiar to this particular magistrate [2]. Almost every one of the directions to this officer relates to the view of the dead body or the prosecution of the murderer, and most of them are now put in execution, particularly with regard to the very minute description of the wound, which hath undoubtedly occasioned the now-settled form of one part of the indictment for murder: *Item de omnibus plagis videndum est, quæ sit longitudo, latitudo, et profunditas, et quibus armis vulneratus sit læsus, et in quâ parte corporis.*

[2] A late publication derives coroner from *Corphconner*, or *viewer of the corpse*.

THE STATUTE OF BIGAMY,

4 Edw. I. A. D. 1276.

THE title of this statute hath no kind of relation to the greatest part of the contents. The fifth chapter takes away the benefit of clergy from him who is a bigamist, or who hath married a second wife after the death of the first. As for the crime of polygamy, it hath not been made penal by any statute till the time of James the First. A canon of Pope Gregory the Tenth had taken away all clerical privileges from a bigamist, as the marrying a second wife was considered, by the ecclesiastical law, to be a proof of a most incontinent disposition [a]; this regulation having been adopted in England, the clergy had a doubt, whether a person, who had been guilty of this offence before the canon took place, might claim the indulgence of the common law; this statute, therefore, retrospectively declares, he shall not be entitled to such privilege. Prynne [b] takes notice of two mistakes made by Sir Edward Coke relative to this statute [c]. The first relates to the name of the pope, who made the canon; and the second to the preamble, which is misrecited. The pope who summoned the council at Lyons was Gregory the Tenth, and not Boniface the Eighth, who was not elected in the twenty-eighth of Edward the First, and consequently not till four and twenty years after this statute was enacted. If it is said, that this mistake of Sir Edward Coke is not of any very material consequence; the answer is, that, his Institutes being the best law-chart, and implicitly trusted to, it is proper to take notice of every shoal or rock misplaced, though perhaps not in the common track of navigation.

[a] See Muratori's *Antichità Italiane*, vol. i. p. 269. Napoli, 1752, 4^{to}.[b] *Records*, vol. iii. p. 151.

[c] 2d Institute.

STATUTUM GLOUCESTRIÆ,

6 Edw, I. A. D. 1278.

THIS parliament was held at Gloucester, and, as the preamble of the statute informs us, in the month of August; I should think, from that circumstance, rather in the return [*d*] of Edward from Wales, than, as Carte [*e*] supposes, in his march thither.

[*d*] This conjecture seems to be confirmed by the present statute's consisting of fifteen chapters, or so many distinct laws; for which there would have hardly been leisure whilst Edward was on his march against the enemy.

[*e*] In this early part of the English history, I should always prefer the authority of Carte to any other historian: he was indefatigable himself in his researches, having dedicated his whole life to them, and was assisted, in what relates to Wales, by the labours of Mr. Lewis Morris of Penbryn, in Cardiganshire*: as for his political prejudices, they cannot be supposed to have had any bias in what relates to a transaction 500 years ago, and which hath nothing to do with the royal touch for the cure of the king's evil. I should here make an apology for introducing what hath no relation to the present statute; but I cannot help mentioning what I once heard from an old man who was witness in a cause with regard to this supposed miraculous power of healing. He had, by his evidence, fixed the time of a fact by Queen Anne's having been at Oxford, and touched him, whilst a child, for the evil: when he had finished his evidence, I had an opportunity of asking him whether he was really cured? Upon which he answered with a significant smile, that he believed himself to have never had a complaint that deserved to be considered as the evil; but that his parents were poor, *and had no objection to the bit of gold*. It seems to me, that this piece of gold, which was given to those who were touched, accounts for the great resort upon this occasion, and the supposed afterwards miraculous cures. Fabian Phillips, in his treatise on

* See Carte, vol. i. p. 33.

ther. The chief purpose, for which the king assembled this parliament, was to oblige those, who claimed any franchises or liber-

Purveyance, asserts, that the angels, issued by the kings of England on these occasions, amounted to a charge of three thousand pounds *per ann.* P. 257.

Queen Elizabeth was so tired of touching those who desired to be cured for the evil, that, in Gloucestershire, during one of her progresses, she told those who were pressing on her, that God only could relieve them from their complaints. Fuller's Ch. Hist. p. 146. citing Cambden's Elizabeth.

Sir Kenelm Digby informed Mons. Monconys, that, if the person cured lost the piece of gold, the complaint immediately returned. Moncony's Travels, t. ii. p. 20.

Gemelli (the famous traveller) also gives an account of 1600 persons being presented for this purpose to Lewis the Fourteenth on Easter-Sunday, in the year 1686. Gemelli was himself present at this ceremony, and says the words used were, *Le Roy te touche, Dieu te guerisse.* Every Frenchman received 15 *sous*, and every foreigner 30, after being touched: to some of the supposed patients the king said, *Are you sick too?* This power of healing by the kings of France occasioned great resort to Francis the First (whilst prisoner at Madrid) by the Spaniards, who did not conceive that their own king's touch would effect the cure. Favins Théâtre d'Honneur, vol. i. p. 261. Laurentius, Physician to Henry the Fourth of France, and a poet of the times, alludes to this, in the following verses:

"Ergo manu admotâ sanat Rex cheradas, estque

"Captivus superis gratus, ut ante fuit.

"Indicio tali, Regum sanctissime, qui te

"Arcent, invisos suspicor esse Deo."

It appears by a proclamation of the 25th of March, and 14 Jan. 1. that the kings of England would not permit such patients to approach them during the summer.

By another proclamation of the 18th of June, 1626, it is ordered, that no one shall apply for this purpose, who does not bring a proper certificate that he was never touched before. This regulation undoubtedly must have arisen from some supposed patients, who had attempted to receive the bit of gold more than once.

ties,

ties, to shew their title to them before the king's justices, or otherwise to seize them as forfeited to the crown. Mr. Cay hath therefore very properly printed the statute of *Quo Warranto*, as a law which passed in the year 1278, instead of making it an act of the thirtieth year of Edward the First, as it had been erroneously published in the preceding editions. We find that this law was most reasonably thought to be oppressive when carried into execution; the Annals of Waverley give this account of it: "In hoc anno exiit edictum a curiâ regis ad universos comitatus totius Angliæ, per breve quod vocatur ab incolis *quo warranto*, ad certos justitios directum, ad inquirendum de libertatibus quibuscunque quomodo a domino rege tenebantur; cujus brevis occasione omnes archiepiscopi, episcopi, abbates, priores, comites, barones, et cæteri libere tenentes, *variis laboribus et expensis* fuerunt prægravati, et etiam *rex ne parum quidem emolumentum inde affectus est* [f]." Which is indeed, I had almost said providentially, the necessary consequence of a tyrannical law. Besides what I have here transcribed from the Annals of Waverley, Falle, in his account of Jersey, mentions some most violent proceedings under this statute, during the reign of Edward the First, in that island. The earl of Gloucester also presented a petition to parliament in this same year, on account of the law which they were about to pass [g].

I have been informed, that Cardinal Fleury, at the latter end of his administration, either issued, or intended to issue, an *arret* very similar to this oppressive statute of *quo warranto*: upon the general alarm [b] occasioned by this design, the French inhabitants

[f] Gale, vol. iii. p. 235.

[g] See a MS. of Lord Chief Justice Hale, now first published by the munificence of parliament. Petitions, vol. i. p. 8.

[b] This alarm probably occasioned the publication of the *Rolles Gascoynes* by Carte, in the year 1743. This valuable collection of the titles

tants of these provinces, which formerly belonged to the crown of England, were furnished in several instances with evidence of their titles to franchises from our records.

This statute consists of fifteen chapters; most of them relate to the amendment of the common law as it was then practised, but at present are not very material. From these I must except the first chapter, which relates to damages and costs [i]; the eighth, which enacts, that the cause of action in the king's superior courts shall exceed forty shillings [k]; and the ninth, which takes away a very extraordinary doubt in the

of all the records in England, which relate to the French provinces, formerly under the English dominion, and chiefly Gascony, being calculated for the use of the French, is preceded by a Preface in that language. The titles only of these records make two folio volumes; it would certainly however be a work deserving the encouragement of both nations, and of all learned men throughout Europe, to print these instruments at length: the same may be said with regard to the records in the Bermingham * Tower at Dublin, some of which go as far back as the reign of Edward the First.

[i] Pierre de Fontaines, the oldest writer on the French law (except Beaumanoir), informs us, that anciently in that kingdom there were no costs. *Inst. Cout.* p. 216.

[k] The spirit of this law deserves to be much attended to at present, when the value of forty shillings is so very considerably lowered. Many dissertations have been written with regard to the value of money in the different reigns of the kings of England; I shall choose to fix this by some statutes which shew either expressly or by implication this comparative value. By the statute of Westminster the first (3 Edw. I. cap. v.) no man is to be refused bail for a larceny under 12d †. Sir Henry Spelman hath observed on this part of the statute, that, when every thing else

* So called from Sir *Walter Bermingham*, of *Bremingham*, who was Lord Deputy, and is styled Baro de Loweth, in a Writ of 15 Edw. II. See Petyt Mss. vol. xviii. p. 79.

† By an ancient law of Scotland, "It is statute, that no man shall be hanged for less fault than twa scheep, whereof ilk ane is worth 16 pennies." [The law of Burdinsceck. *Reg. Mag.* translation by Skene]. 16d. Scots, is at present only 1d. and $\frac{1}{4}$. "Si latro abstulit ultra quinque solidos, tunc debet ille suspendi, sed non ad patibulum ordinarium." *Speculum Suevicum*, cap. xxxviii.

the common law, whether a man killing another in his own defence, or by misadventure, should be prosecuted as a felon [1]. The eleventh, and three following chapters, relate to the city of London only, which is a proof of the great importance of this metropolis, even so early in our history.

is growing dearer, a man's life is forfeited every day for what is of less and less value. Judges and juries, indeed, from commendable motives of humanity, do not weigh the price of what hath been stolen in *golden scales*; but is there not a great impropriety in a jury's finding, on their oaths, that goods produced in court (which every one sees are perhaps of twenty times the value) are only worth 12 *d.*? and may not this liberty taken with their oath make them and the audience less attentive to it upon more material points? But not to digress. There is a statute of * 21 James I. cap. vi. which says, that a woman shall not lose her life for a larceny under ten shillings: this therefore shews, that, in the year 1623, the value of money was ten times less than at the time of making the statute of Westminster the first; and it might perhaps be very proper to extend it, in the year 1774, to twenty shillings. There is another act of parliament (13 Charles II.) first printed by Mr. Ruffhead, which regulates the fees of the Masters in Chancery; the preamble to this act recites, that these offices were as ancient as the Conquest, and that 4*d.* at that time was more than two shillings in the year 1661. It must be admitted, that these statutes do not entirely agree in their comparative value of money; but at the same time a medium between them may perhaps be the best direction to form a judgement upon.

Clarke, in commenting upon a Saxon law, says, "The fine of 24*ol.* " in all appearance so contemptible [for killing the King], was in its *real* " value near 700*l.* sterling, and in its *relative* one, i. e. in proportion " to the different value of money in that age and this, was not less than " 14,000*l.*; for the difference might be reasonably estimated at twenty to " one, besides the weight." Connexion of Roman and Saxon Coins, p. 32.

[1] It is recited by the preamble to the 24 Hen. VIII. cap. v. to have been doubtful by the common law, whether a forfeiture of goods and chattels was not incurred by the killing of a thief or murderer.

* The title of this statute is, *An Act concerning women convicted of small felonies*, who, by the common law (it cannot be said to its humanity), were excluded from the benefit of clergy; if it be urged, that in point of form they could not claim such a privilege, the answer is, that they should have been entitled to the same indulgence, though they could not allege that they were clerks.

A STATUTE 30 DIE OCTOBRIS,

7 Edw. I. A. D. 1279.

To all Parliaments and Treaties every one shall come without force of arms.

THIS and the following law with regard to mortmain are the only statutes of the year 1279. The first of these recites *sundry debates between the King and certain great men*. History is entirely silent with regard to the cause of these debates, or indeed that there were any disputes at this time between the king and his barons. There seems to be little doubt, however, that the statute, entitled *Extenta Manerii*, made three years before, which was another Domesday Survey, and the statute of *Quo warranto*, made the preceding year, might occasion these troubles, especially as the first article of the *Extenta Manerii*, relative to fortified castles, might possibly have been carried into execution. That the points contested were of consequence, may be inferred from the tumultuary proceedings which this statute forbids, when there should be any applications made to the king and parliament.

Both this and the following statute are directed to the justices of the King's Bench, to be there inrolled and proclaimed; and as the first relates to dangerous riots, there was a peculiar propriety in transmitting it to the court of the highest criminal jurisdiction in this country. The first of these laws is in French; the second, making some new provisions with regard to disposing of lands in mortmain, is in Latin, agreeable to an observation which I have before made, that, when the interest of the clergy is concerned, the statute is generally in the Latin language.

Bishop

Bishop Kennet, in his Glossary, at the end of his Parochial Antiquities (*verbo* RELIGIOSI) observes, that, before any statute of mortmain, the inconvenience of these benefactions to the clergy was so sensibly felt, as often to occasion the following condition in grants and conveyances, “*Tenendum sibi et hæredibus suis, vel cuicunque vendere, dare, vel assignare voluerint, exceptis viris religiosis, et Judæis.*” Baker [m], in his Chronicle, also informs us, that the number of monasteries built in the reign of Henry the First was so great, that almost all the labourers of the country became bricklayers and carpenters. We have already found, that this growing [n] abuse was endeavoured to have been prevented by an article of Magna Charta; but, that provision having been evaded, the present statute says, that it shall not be done *quâcunque arte, vel ingenio.*

The opposition to Mortmain at this time arose from very different reasons, than those which have been the cause of the later statutes against it: as the land was given to God, the king and the barons lost all the usual profits of what was held under them; they had no notion of an inconvenience or mischief to the public from a stagnation of property, which hath chiefly occasioned the last most effectual statute against lands being given to corporations. As for the testator's disposing of his effects, in prejudice to his relations, that is still left open as to personal

[m] Baker is by no means so contemptible a writer as he is generally supposed to be; it is believed, that the ridicule on this Chronicle arises from its being part of the furniture of Sir Roger de Coverley's hall. Spectator.

[n] Dugdalè, in his Monasticon, makes Roger de Morteymer exclaim strongly against this practice, vol. ii. p. 218. “Vees beals seigneurs, “common mon pere me desheritat, a qui per tuts raisons dust aver “vouchsafe tut son heritage, sans demembrer ces champs. Mes il a “done a *ceux vyleins* del Abbey.” These words of Roger de Morteymer are taken from an account of the priory of *Wigmore* in Herefordshire, in the time of King Stephen.

Q

estate,

estate, from which a benefaction of this kind is much more likely to arise, than from a gift of lands; as men possessed of this species of property have generally so much pride, that they will leave it to any one who can keep up their family, which a religious house or college can never do. A law, however, might be so framed, as to encourage and promote the circulation of landed property by benefactions to mortmain purposes, as if the bequest was made void, unless the estate was sold within a year after the devise took effect [o].

[o] It appears by one of Pliny's letters, that no one could leave any thing to the republick; Pliny however, who by this means became residuary legatee, waved the benefit of the law, which he might have insisted upon, in terms that do him too much honour not to be here inserted: "Mihi autem defuncti voluntas (vereor quam in partem juris-consulti quod sum dicturus, accipiant) antiquior jure est, utique in eo quod ad communem patriam voluit pervenire." Pliny, lib. v. ep. 7. It may be inferred from this, that, if Pliny had been an Englishman, he would have highly venerated the memory of Sir Joseph Jekyll, for his legacy to the *sinking fund*.

A NEW STATUTE [p] OF THE EXCHEQUER,
CALLED THE STATUTE OF RUTLAND,

Made 24 Maii, Anno 10 Edw. I. A. D. 1282.

I SHOULD not have made any observations upon this statute, which contains regulations that concern few except the officers of the *Receipt* of the *Exchequer*, was it not to introduce the remark of Prynne on some mistakes of Lord Coke, and others; I shall refer the reader to p. 55, 56, and 57, of his *Animadversions* on Coke's 4th Institute, as they contain many curious particulars not only with regard to the present statute, but with relation to Edward's expedition against Wales; especially as they are inserted, like many other things in this laborious compiler, where they cannot be easily found. This indefatigable antiquary hath proved beyond all doubt, that no parliament was held either at Rutland in England, or Rhydland in Flintshire, in this year of Edward the First. With regard to *Rutland* in England, I cannot find any *town* with such a name: as for Rhudhlan in Flintshire, Edward the First built a very considerable castle there; but Prynne hath shewn, that though this king was in North-Wales during the year 1282, yet all patents signed by him bear date from other places.

[p] It is called, *A New Statute*, being posterior to the *Statutum de restrictione Scaccarii*, already commented upon. Sir Edward Saunders, Lord Chief Baron of the Exchequer, expressly lays it down, *that this is no statute*, but only the king's pleasure. Sir Chr. Hatton's *Treatise on Statutes*, p. 7. London, 1677. 12^{mo}.

STATUTUM DE MERCATORIBUS.

THE STATUTE OF ACTON BURNEL,

Made Ann 11 Edw. I. A. D. 1283.

THIS ordinance bears date at *Acton Burnel* [q], in Shropshire, the 12th day of October, in the 11th year of this king's reign; this parliament must therefore have been held in Edward's return from Wales; and the attendance could not have been very numerous, as it is believed that *Acton Burnel* was never even a market town [r]. I should imagine, that Edward's inducement

[q] There are, in Spelman's Index Villaris, no less than eighteen towns, or villages, with the name of Acton, which is not extraordinary, as it signifies no more than *Oak Town*: Acton Burnel is in Condover Hundred, and was so called probably from the family of Burnel, which, Camden informs us, is one of the most ancient in Shropshire. "Acton Burnel was a goodly place, or castel, four miles from Shrewsbury, where a parliament was kept in a great barne. It longgid ons to the Lord Lovel, then to the Duke of Norfolk, and now to Sir John Duddle." *Lel. Itin.* vol. vii. p. 19.

It appears, by a manuscript in the library of the Inner Temple, that this parliament was summoned to meet at Shrewsbury the day after Michaelmas; I should therefore suppose that it was adjourned to the 12th of October, when it was to be held at Acton Burnel, on account of some contagious distemper, or other accident. See *Theatrum Criminalium*, vol. i. p. 10. one of Mr. Petyt's manuscripts.

[r] Whitelock cites a manuscript of Sir Roger Owen's* (who was his particular friend, and a great antiquary), in which he asserts, that the house of lords sat during this parliament at *Acton Burnel*, and the house of commons at Shrewsbury. *Comm. Parl. Writ*, vol. i. p. 208.

* Mr. Petyt, in his Collection of Mss. likewise frequently cites the authority of this Sir Roger Owen, who seems to have been one of the most considerable antiquaries of his time. He was a judge [Gough's Introd. to the Archaeologia, p. xix.], and wrote a treatise "Of the Antiquity and Excellency of the Common Laws of England," which it should seem was in the hands of Sir John Trevor, Master of the Rolls. See *Hickes's Thes.* vol. ii. p. 82. Dissert. Epist.

to hold a parliament in so insignificant a place [s] arose from its lying on the borders of Wales, where he probably planned that chain of castles in the western part of Shropshire, the ruins of some of which remain to this day. Speed, who supposes there are but 186 in all England, allows thirty-six to this county only.

This law is entitled, κατ' ἐξοχην, *Statutum de Mercatoribus*, and taken together with the provisions made by Magna Charta, in the favour of merchants who are aliens, does particular honour to the humanity and wisdom of our ancestors. How different are the policy and laws of the French for example, who suppose that they are patterns to the rest of Europe for the civil reception, and indulgences granted to foreigners! An alien indeed cannot in this country hold land, any more than in France; but he knows the law, and hath no occasion to make such purchase. No one can travel however [t] without considerable sums, much less can he merchandize; and yet, by the *droit d'aubaine* [u], all the personalty belonging to a stranger is forfeited, upon his death, either to the king, or his grantee; this continues to be the law

[s] The end of the building in which this parliament was held is now said to form part of a barn. There is, in the town of Machyntlleth in Montgomeryshire, a large house, in which, by tradition, Owen Glendower is said to have held a parliament, by which must be meant a conference in the sense I have before contended for. The building (as far as I can trust my memory) is sixty feet in length, thirty in breadth, and about twenty-four feet high: three or four poor families now live within the walls, and under the roof.

[t] As for bills of credit, they were probably not used at this time.

[u] This is in Latin *jus alibi natorum*. Boileau, in his eighth Satire, inveighs against the barbarity of this law.

“Un aigle sur un champ pretendant droit d'aubaine,

“Ne fait point appeller un aigle *a la bultaine*.”

i. e. to answer on the eighth day after being summoned. Mons. Bruffel, in his treatise on Fiefs, observes, the *droit d'aubaine* anciently extended not only to foreigners who were born out of the kingdom, but to those who were born in one lordship, and died in another. T. ii. p. 947.

of France also in the *eighteenth century*, and is frequently put in execution.

At Geneva, the restriction with regard to holding land is not against the stranger, but his persuasion in matters of religion: a catholick cannot purchase in the territories of that republic.

There are two regulations [*w*] in this statute which deserve to be taken notice of: the first is, that, if the creditor [*x*] imprisons the debtor, and he hath nothing to live upon during his confinement, the creditor must provide him with bread and water [*y*]. The second is, if the creditor is *a stranger*, the debtor is not only to pay the debt, but likewise the extraordinary expence which the *stranger* hath incurred during his stay in England to prosecute his suit, till the time that he hath execution against the debtor's goods. The humanity [*z*] of this further provision in favour of an alien merchant is somewhat tainted by the conclusion of this law, which says, that a Jew shall in no case be entitled to it: this is however in some measure pardonable, from

[*w*] The debtor's recognisance is ordered to be taken before the mayors of *London, Bristol, or York*; these were therefore undoubtedly the principal towns of the kingdom at this time for trade.

[*x*] Selden says, with our ancestors, *Vinculis coercere rarum erat*. It is believed, that the Russians are the only nation in Europe, who punish the debtor with stripes. Le Brun, vol. i. p. 45. Amsterdam, 1718.

[*y*] On the contrary, by 13 Edw. I. cap. i. the servant, who hath not accounted with his master, is to be committed *in vinculis*, and to live in gaol *de proprio*.

[*z*] One of the strongest instances of favour to a stranger in obtaining his right by an action, seems to have been shewn to Fynes Morryson, at Lindaw, in Germany, where he not only obtained immediate satisfaction from the judge, but his advocate would not take any fee from him as being a foreigner. Part iii. p. 204.

Tavernier mentions, that one of his fellow-travellers happening to dye in a Persian town, a seal was immediately put upon the effects of the deceased, which, on his return a year afterwards, had not been removed. Vol. i. p. 242. Paris, 1682. 4^{to}.

the

the strong prejudices which prevailed at this time throughout Europe against this unhappy people; prejudices, which are not totally eradicated at present, and which occasioned the shameful repeal of a late law, founded upon the wisest principles of commerce.

This statute was further explained, and new provisions added, by the thirteenth of Edward the First, Statute the 3d, which bears the same title, viz. *The Statute of Merchants*. Mr. Cay hath, in this law of the thirteenth of Edward the First, very properly inserted a various reading from a manuscript in the Cotton library, which says, that the recognisance shall be taken before the mayor of *London*, instead of the mayor of *Appleby* in *Westmoreland*; as the session of parliament, in the thirteenth year of this king's reign, was held at Westminster immediately after Edward's return from Bury, where he had continued during the preceding Easter, Appleby could never have been thought of, unless by a parliament assembled in the North of England. This explanatory statute of the thirteenth of Edward the First likewise gives us the form of the writ, upon such a recognisance having been entered into, and the debtor's not having satisfied his creditor. There is an ordinance of Francis the First, in the year 1536, very similar to this statute, which shews the more early attention to commerce in this country.

STATUTUM WALLIÆ,

12 Edw. I. A. D. 1284.

THIS statute bears date “apud Rothelanum” (which is now called Rhudhlau [*a*] in Flintshire) “die dominicâ in medio quadragesimæ, anno regni nostri duodecimo:” it is certainly no more than a set of regulations made by the king in council, for the government of Wales, which the preamble informs us was now totally subdued [*b*]. This law deserves most particular notice, though little attended to either by lawyers or historians, except Carte, who touches upon it but transiently. It not only informs us what were the customs in Wales at that time, but likewise, by the remedies provided, what was the law of England.

In order to make these new regulations upon the best consideration of the different laws of the two countries, Edward had, the year before, directed inquiries upon oath before certain commissioners, with the bishop of St. David's for their president,

[*a*] There is a manuscript of this law in the Hengwrt Collection. See Lhwyd's Arch.

[*b*] Though the total conquest of Wales is here recited, I should doubt whether it extended to any other counties than those which are mentioned, viz. Merioneth, Carnarvon, Anglesey, and Flintshire; as likewise the counties of Carmarthen and Cardigan in South-Wales. Edward had only built his castles in these counties, viz. Rhudhlau, Conway, Beaumaris, Carnarvon, Harlech, and Aberystwith; all of which we know, either from history or records, were royal works of this reign, except Harlech, which seems to speak for itself to have been planned by Edward. Without such castles, it was impossible to keep an entire or permanent dominion over such a country as Wales. We therefore find mention of the *Clericus operationum castrorum in Walliâ*, in the second year of Edward the Second. See the lately-printed Petitions to Parliament, vol. i. N° 1. p. 273.

whose

whose certificates and returns are printed in the Appendix to Hoel Dda's Laws, and contain many curious particulars with regard to the customs which prevailed in Wales before Edward's conquests, some of which are still retained, others altered, and some entirely abolished, by this statute: I shall here take notice of but two or three of them. All the witnesses agree [c], that the princes of Wales could alter the laws at their pleasure, nor do they make the least mention of a parliament, or even a council: the inference from this seems to be, that the inhabitants of this island have adopted the institution of parliaments, from some of the invading strangers. The next observation I shall make upon the examination of these witnesses is, that there is no allusion to any sort of feudal tenure, which confirms what I have before advanced, that they were unknown in this country before the Norman Conquest. There are indeed at present in North-Wales no copyhold tenures, and scarcely an instance of what are called manerial rights, the property being commonly allodial. We find likewise, that gavelkind prevailed throughout Wales: the right of succession to lands in the eldest son must have therefore been derived from the Normans [d]; as was also the trial by battle, which was before unknown in the principality.

The

[c] One hundred and seventy-two were examined at the four different places, where those commissions were executed. See the Appendix to Hoel Dda's Laws.

[d] I find by some old French verses of Guillaume Guiart d'Orleans *, that in the year 1263, at the latter end of the reign of Henry the Third, this point was considered by the English Parliament, and that the estate was at that time equally divided in some parts of France:

“ L'an se dit faux, ne fui noifans,
 “ Mil deux cens foixante trois ans.

* These verses are cited by Borel from a manuscript, under the article *Tgaument*, in his learned Glossary, which is printed at the end of *Menage's Dictionnaire Etymologique*. Paris, 1750.

R

“ Sans

The preamble to the statute recites, that Wales was, before the conquest of Edward, *jure feudali subiecta* to the crown of England,

- “ Sans plus, d'incarnation quierre ;
 “ Fit venir le Roi d'Angleterre,
 “ Des fiez qui lui appartindrent,
 “ Tous les Barons que terres tindrent ;
 “ Lesquieux ensemble a Parlement,
 “ Il pria debonnairement,
 “ Que communement s'accordassent,
 “ A ce qu'une coustume ostassent,
 “ Qu'en est de tres longue tenue ;
 “ Par son Royaume maintenu,
 “ Et vous diray quel, en disant ;
 “ S'uns boms gentis, ou * plaisant (* paisant perhaps)
 “ Fut la mors, et enfans eust,
 “ Pleut li, ou le depleust,
 “ Le statut a ce s'apportoit,
 “ Que l'aisne le tout emportoit,
 “ Li autre rien n'en recouscissent
 “ Al assent, quel part quil voussissent.
 “ Leurs droits ierrent anfi devisez.
 “ Li Barons du fait avisez,
 “ Quils commirent a deshoneste,
 “ Obeirent a sa requeste,
 “ Et vouldrent (tant furent menez),
 “ Que les enfans d'un pere nez,
 “ S'engendrez fussent loyaument,
 “ Partissent a leur ygaument,
 “ Et selon l'ordre quils devoient,
 “ Comme cil di France faisoient.”

As I did not understand the first line of these ancient historical verses till after a second or third reading, I shall by a translation of it possibly save the reader the same trouble; it signifies, *that if there is a mistake in the date of the year, it is not very material*. I must own likewise, that the 20th line is not to me thoroughly intelligible,

“ *Al assent, quel part quil voussissent.*”

Glanvil, who is supposed to have written in the time of Henry the Second, lays

land, which expression is very remarkable, as it is believed no instance can be found in any record, or ancient historian, of a *jus feudale* prevailing in this island: we hear indeed of the word *feudum*; and the distinction between the *feudum novum* and the *feudum antiquum*; but a regular system of feudal law, which this expression seems to import, there are but very slight traces of [e]. Edward however was conqueror, and had a right to make use of his own words in the preamble to his law.

After the introduction, very complete directions are given to the sheriff and coroner, upon whom so much depends with regard to the execution of the law, some of which I shall here inlay it down expressly, that, if the lands were held *per militem*, the whole estate descended to the eldest son; *sin autem liber fueret sokmannus*, the patrimony was then equally divided. Glanvil, lib. vii. cap. iii.

There is a proof, that gavelkind prevailed anciently in Britany by an ordinance of Geoffrey Earl of Richmond, in the year 1180. This edict issued in Bretagne, he having married the heiress of that Dutchy: "Cum
" in Britannia super terris inter fratres dividendis detrimentum plurimum
" evenire soleat, Ego Gofridus, Henrici Regis filius, Dux Britannia, et
" Comes Richemontis, *Affisam* feci, et concessi quod in feodis militum
" ulterius non fiant divisiones." *Favin's Théâtre d'Honneur*, vol. i. p. 906. Paris, 1620.

Pasquier likewise confirms this: "Semblablement vindrent en usage
" les loix de droit d'ainesse, *non cognues, par nos François* sur leur premiere arrivée, p. 127. Paris, 1633, Folio. He also in another part observes, that those provinces of France, the dukes of which had given the greatest opposition to the king, had more particularly introduced this mode of descent, because the eldest son, obtaining the whole patrimony, could assist his Lord in war more powerfully than if there had been an equal partition, p. 138.

[e] There is likewise another expression borrowed from the Norman and feudal law in this preamble, viz. "*qui alto et basso se submiserunt.*" Though there have been of late years two or three very ingenious treatises to explain the ancient common law by feudal principles, yet it is very clear, that neither Littleton, nor his Commentator, Sir Edward Coke, seem to have known that such a law prevailed in any part of Europe, much less in England.

sert, as they throw great light not only on the powers of these officers, but likewise are explanatory of other circumstances relative to the state of the criminal law at this time [f].

After the duty of the sheriff in the execution of his office is explained, the statute then proceeds in the same manner with regard to the coroner [g], in which he is directed, amongst other particulars, to attend upon information of a man's being so dan-

[f] "Vicecomes per sacramentum duodecim libere tenentium de discretioribus et legalioribus, vel plurium pro discretione vicecomitis, diligenter inquirat de capitulis, coronam domini regis tangentibus, subscriptis.

"De macerariis, carnes furatas scienter vendentibus et ementibus.

"De whittanwariis, scilicet qui coria bovina et equina furata scienter albificant, ut sic non agnoscantur.

"De redobatoribus pannorum furatorum eos in novam formam redigentibus, et veterem mutantibus, ut de mantello tunicam vel supertunicam facientibus, et similia.

"De hiis qui contra adventum et iter justiciarii se subtraxerunt, et post iter justiciarii redierunt.

"De raptoribus virginum sanctimonialium, et matronarum honeste ventium.

"De usurariis.

"De hospitantibus ignotos ultra duas noctes.

"De sanguine effuso.

"De huthesio levato.

"De tondentibus multones noctanter in ovilibus, et eos excoriantibus, vel etiam alia animalia.

"De capientibus et colligentibus noctanter blada in autumpno, et ea asportantibus; et de omnibus aliis hujusmodi malefactoribus."

[g] The two statutes of Exeter, made in the fourteenth year of this king, relate almost entirely to the office of coroner, though they are not taken notice of by any writer of the law, and probably because the French is very corrupt. I should imagine, these statutes were made to restrain the rapine of the people, called *Gubbins*, who lived on *Dartmore*, being the marches between Devonshire and Cornwall, and who continued to be lawless in the time of Queen Elizabeth. See Carew's Cornwall.

gerously wounded that his life is despaired of, and he is likewise ordered to summon a jury. This branch of duty in a coroner is now totally neglected, as his proceedings are only *super visum corporis*; it is a regulation however which deserves much to be revived, and I should conceive, that this attendance of the coroner with a jury, when a dangerous wound had been received, was to prevent the dying words of the person murdered from being evidence, as this kind of proof though allowed at present cannot be too cautiously admitted. It is presumed indeed, that the words of a person expiring cannot but be true, considering the situation under which he gives the information. But may not a dying man, though a good Christian, deprived of expected happiness in life by a wound received perhaps from an enemy, rather wish his punishment more eagerly than he should do? and may not those about the dying person, who are generally relations, repeat what he hath said more strongly, on the trial, than possibly the words were delivered?

After this, the duty of the coroner in cases of *abjuration* is explained, which is now indeed abolished; it may not however be improper to mention the particulars of this punishment, as described by the statute. If a felon or murderer fly to a sanctuary after the offence is committed, the coroner is to send to the king's bailiff of the commote [b], who is to summon a jury of the neighbourhood [i]. The felon is then to make his abjuration in the presence of the jury, after which he is to be led to the porch.

[b] A *commote* in Wales signifies a portion of land equal to the fourth part of a *cantred*, *unius commoti solum*, i. e. *quartæ partis cantredi*. Girald. Camb. cap. ii. "Habet autem hæc insula (*Mona*) trecentas "quadraginta villas, et pro tribus *cantredis* reputatur." The word *cantred* is compounded of *cant*, which signifies a hundred, and *tre*, a town.

[i] The common reason for a jury's coming from the neighbourhood, viz. *quod vicini vicinorum facta præsumuntur scire*, does not seem to be satisfactory; neighbours indeed know the facts; but they often have strong prejudices: the reason given afterwards in this statute seems better founded, *ne patria laboribus et expensis fatigetur*.

of

of the sanctuary, and the coroner is to appoint a port, from which he is to embark for banishment; to this place he is also to proceed by the nearest highway without ever turning to right or left, and to carry a cross in his hand till he arrives.

After what relates to the sheriff and coroner, the statute then gives the form of writs in those Actions which were at that time most commonly used. The drawing up these writs was anciently thought to be of such consequence, that it was one of the articles insisted upon by the barons in the year 1258, that the chancellor should not only be elective, but should take an oath, *Que il ne enselera nul brief, fors brief de curs, sans le commandement le roi, et le conseil* [k].

It is likewise well known, that there is no legal argument which hath such force, in our courts of law, as those which are drawn from the words of ancient writs; and that the *Registrum Brevium* is therefore looked upon to be the very foundation of the common law [l]. I have compared the writ of *Novel Disseisin*, as set forth in this statute, and likewise the writ of *Mortdancer*, with the forms in the register, which seem to tally exactly (*mutatis mutandis*) for England and Wales. I have likewise compared them with the forms in that ancient book in the Scotch law, entitled, *Quoniam Attachiamenta*: the comparison of these writs seems most fully to prove the great authority which is due to our *Registrum Brevium*, and likewise that the law of Scotland, as hath before been contended, agreed anciently not only with the principles of the law of England, but in its practice, though there might be some variances of no great importance.

[k] Gale, vol. i. p. 413.

[l] "All original writs must be found in the register, nor can be supplied but by the statute of *Westminster the Second*, which gives the writ *in consimili casu*." Said by Sir Joseph Jekyll in Colonel Pitt's case. *Cunyngham's Rep.* p. 25. Sir Edward Coke supposes, in the Introduction to the 10th part of his Reports, that *the Register of Writs* is the most ancient book in the English law.

STATUTA

STATUTA REGIS EDWARDI,

Edita apud Westmon' in Parlamento suo, Pasch. anno Regni sui
tertio decimo, A. D. 1285.

THIS collection of laws, which is divided into fifty different chapters, contains matter of so miscellaneous a nature, that it is impossible to reduce the observations to be made upon it into any sort of connexion, any more than the comment upon Magna Charta. Most of these chapters were made with an intent to amend the law as it was then practised, and more particularly, as the preamble informs us, to explain some parts of the statute of Gloucester, which passed in the sixth year of this king's reign. I should imagine, that it is from this collection of laws, generally called *Westminster the Second*, that Lord Coke, in the Introduction to one of his *Commentaries* [m], hath styled Edward the First *the English Justinian*.

The first chapter secures the estate given to a man, and the heirs of his body, called an estate tail, to his issue; and in case he hath no issue of his body, then to the donor or his heirs; the statute very properly says, that the first taker's alienating is *contra formam doni*, and, it being so, such alienation should have been

[m] I call the different parts of Lord Coke's Reports his *Commentaries*, as this is the name which he generally distinguishes them by himself. I should perhaps make an apology for having cited this great lawyer, under the title of *Lord Coke*, but it is the name of Pre-eminence which he hath obtained in Westminster-hall: the late publication of the Journals of the House of Commons shews, that he did not as a member of parliament prostitute his amazing knowledge of the municipal law to political purposes, as he generally argues in the same manner and from the same authorities which he cites in his Institutes.

void.

void at common law, as, if the law permits the limitation, the intention of him who creates the estate should always not only be attended to, but carried into execution; otherwise, why is any one allowed to dispose of his estate by a deed solemnly executed in the presence of witnesses?

This chapter of Westminster the second is generally supposed to have introduced *estates tail*, but it should more properly be said to have established them. Selden thinks he hath found traces of this kind of estate in the laws of Ælfred, “Qui terram habuerit per scripturæ seriem (sc. *Bookland*) sibi a majoribus relictam, ab hæredibus ad alios alienandi potestas non esto, siquidem præsentibus cognatis coram rege, aut episcopo, scripturâ aut testimonio probetur, omni alienatione interdixisse ei illum, qui prius concessit, talemque ei imposuisse legem cum primò dederit [n]. En, jurisperiti, feudum quod dicitis *talliatum*, Edwardi Primi decimo supra tertium anno hic multo antiquius habetis [o].” Though what Struvius says, in his *Jurisprudentia Feudalis*, “that entails chiefly prevailed in England,” may be true, yet they are more or less used in most of the countries of Europe, under the name of *Maggiorati* and *Majorats*, and seem likewise to have been universally condemned wherever they have been introduced. Giannone (who derives the *Maggiorati*, used in the Neapolitan territories, from the Norman law, and not from that of the Lombards, in which there is no trace of any such estate) speaks thus of them: “Nel secolo decimo sesto i maggiorati, e le primogeniture (quasi che incognite agli antichi) si resero così frequenti, che la loro materia diffusa empì la giurisprudenza di nuovi termini, di nuove dispute, e nuovi trattati [p].” The same inconveniences could not fail

[n] Ll. Alfr. et. Edg. cap. xxxvii.

[o] Selden, vol. ii. p. 926.

[p] Gian. vol. iv. p. 294.

of being soon experienced in England; for Chaucer, in his character of the *Man of Law*, says,

"All was fee simple to him in effect."

Besides the intricacy and perplexities in the law; besides the stagnation of landed property, so contrary to the promotion of industry [q], these limitations have been productive of perpetual disagreements between the father and his eldest son, which indeed he well deserves from his most unnatural treatment of his younger children, though from custom the hardship does not perhaps strike him, when he makes his marriage-settlement. Younger children in this country are not indeed exposed as they were amongst the Greeks and Romans [r], and as they are to this

[q] See Lord Bacon's use of the law, where he dwells much on the inconvenience of entails.

[r] Besides an infinite number of other proofs, that this most inhuman custom prevailed; see Ælian's History, l. ii. c. vii. where he observes, that the Thebans were the only state in Greece which did not expose their children, and he therefore highly extols their humanity.

With the Romans this most shocking practice seems to have been introduced by the laws of the Twelve Tables. "*Endo liberis justis jus vitæ; necis, venundandique potestas esto.*" And again, "*Pater in signem ad deformitatem puerum citò necato.*" Mem. des Inscriptions, vol. xii. p. 78.

Mr. Locke, after having mentioned this most barbarous of murders (as he terms it), adds, "The dens of lions, and nurseries of wolves, know no such cruelty as this; they will hunt, watch, fight, and almost starve, for the preservation of their young; never part with them, never forsake them, till they can shift for themselves." Works, vol. ii. p. 126. ed. 1759.

The humanity of this most accurate reasoner cannot be too much commended; he possibly, however, did not know what generally passes in the dens of lions, and nurseries of wolves, as the male parent in many kinds of animals often destroys the young, and sometimes devours them.

this day in China; but the very scanty provision made for them, in comparison with the eldest son, seems to approach nearly to this barbarity.

This unequal distribution of the father's estate was unknown anciently[s] in any nation, whether civilized or barbarous; nor do we hear of it at present in any part of the world, but in certain parts of Europe. It can as little be said, that we derived this custom from our ancestors the Germans; for Tacitus, in his treatise *De Moribus Germanorum*, informs us, that *successores sui cuique liberi*; and this equality of distribution, even at this day, generally takes place in personal property, which, being of

The enforcing moral duties from the comparison of animals may be often retorted. If, for example, the idle are exhorted to copy the industry of the ant (though it now turns out that it lays up no store for the winter*), might it not be answered, why may I not rather imitate the American animal, called the *Sloth*, from its aversion to motion? For this reason, Aristophanes (in that most extraordinary comedy, called *The Birds*) makes a chorus of them advise the audience to follow their example, if they have an inclination to break the laws, and live as they would choose, in the following lines:

Εἰ μετ' ὀρνίθων, τις ὕμνων, ὡ θεᾶται, βελέται·
 Διαπλεκεῖν, ζῶν ἡδεως το λοιπόν, ὡς ἡμᾶς ἴω.
 Οσα γὰρ ἐσὶν ἐνθαδ' αἰσχροῖα, τῷ νόμῳ κρᾶτιστα,
 Ταῦτα πάντα ἐστὶ πάρ ἡμῖν τοῖσιν ὀρνίσι, καλὰ.

The chorus then proceeds instancing incest, and many other crimes.

[s]

τοὶ δὲ ζῶν ἐδάσαντο

Παῖδες ὑπερθυμοί, καὶ ἐπὶ κληροῦς ἐβαλοντο.

Odyss. l. xiv.

So Petyt, in his *Leges Atticæ*, ἀπαγορεύει τὰς γυναικας υἱας ἰσομοίρας εἶναι, p. 51. It is remarkable, that the preamble to the 31 Hen. VIII. which disgavels certain lands in Kent, only recites, "for certain causes the king there-
 "unto moving." Gavelkind, however, is also a most unjust distribution of the estate, as the daughters are excluded, who want a provision more than the sons.

* See Gould on Ants.

a more fluctuating nature, pride will sometimes permit to be properly distributed [t].

The perpetuities established by this statute in process of time had so much contributed to the increase of power in the barons, that, about two centuries afterwards, it was in a great measure evaded, by the invention of what is called a common recovery: it was impossible for the crown to procure a repeal of this law in the House of Lords, and therefore the judges had probably an intimation, that they must by *astutia*, as it is called, render a statute of no effect, which the king could not extort an alteration of, from one part of the legislature [u].

The great benefit arising from this method of cutting off an entail, seems to have made us shut our eyes on two very glaring improprieties in this fiction of a common recovery. The first is, that it is directly in opposition to the express words of a subsisting law, and let the inconveniences of a statute be what they may, no judge, or bench of judges, can constitutionally dispense with them; their office is *jus dicere* not *jus dare*. As, then, the mischiefs arising from this chapter of Westminster the second are universally seen and acknowledged, why should it not be repealed by that power which can only abrogate it, the legislature [w]? I never heard but of one objection to this, which is, that

[t] Mr. Hakewill, in one of the Dissertations published by Hearne, gives this very extraordinary reason for the whole estate being limited to the eldest son, viz. that in the northern countries population goes on so fast, that the patrimony would otherwise be frittered to nothing.

[u] Boulainvilliers informs us, that the French nobility had the public spirit, in the year 1560, to oppose limitations beyond three lives. I call it public spirit, because entails are chiefly calculated for the pride of great families, and hence this statute of Westminster the second hath been called the *Statute of Great Men*. Pigott styles it the *Family Land*.

[w] I am aware that some statutes necessarily suppose recoveries to be legal, but this is not the regular and proper method of repealing a sub-

that certain officers and patentees would lose the fees which they are entitled to upon common recoveries. If there are such claimants, who would be injured by the alteration, it is but just that they should have a reasonable compensation, and the repealing act need not consist of many words; it is only necessary to say, that every tenant in tail *shall, to all intents and purposes, be considered as a tenant in fee simple*, which he is indeed at present, with this only difference, that a tenant in tail can dispose of his land but by one method [*x*] (that of a common recovery), and a tenant in fee simple may choose out of many different modes of conveyance.

The other impropriety in the common recovery is the very ridiculous and absurd fiction by which the statute is evaded. There have formerly been many questions arising upon mistakes in suffering recoveries, which, as often as they have been argued, it hath been attempted with great ingenuity to decide upon principles: but how can such a fiction be supported, or any thing relative to it, upon solid ground or argument? Most men

existing law. Bishop Burnet, in his History, somewhere mentions an act of Charles the Second, with regard to drawing of horses a-breast on the highways, which was so impracticable, that the judges on their circuits directed the grand juries not to put it in execution: this seems, however, to have been assuming a very extraordinary liberty with an act of parliament, and that so recent a one. Sir Robert Berkely, indeed, one of the judges in the time of Charles the First, took upon himself to advance in his charge to the grand jury in Yorkshire, that in some cases judges were above an act of parliament. Rushworth, vol. i. p. 364.

I cannot help here taking notice of what seems to be a very great impropriety (permitted every day in the courts of law), viz. the treating modern statutes as being ill penned, or not having been properly considered: they are the acts of the legislature of this country, and therefore such ridicule eternally thrown upon them is surely not inculcating a reverence to the laws.

[*x*] He may indeed, since the statutes of Henry the Seventh and Henry the Eighth, convey likewise by fine.

of fortune and rank in this country never enter a court of justice, but to go through this most ridiculous ceremony: can the serjeants who mutter certain jargon, or the judges who preside, explain to such a person what is going forward? what an impression must this leave with regard to other legal proceedings! In this enlightened age, when other questions are decided with such strength and force of reasoning without that refined subtlety which formerly prevailed to the disgrace of the law, it is high time that there should be an end of such unintelligible trumpery [y]. See Bl. v. ii. p. 360.

C A P. XIV.

CUM de vasto facto in hæreditate alicujus consuevit fieri breve de prohibitione vasti, per quod breve multi fuerunt in errore, credentes quòd isti, qui vastum fecerunt, non habuerunt necesse respondere, nisi tantum de vasto facto post prohibitionem eis factam, dominus rex ut hujusmodi error tollatur, &c.] This chapter of the law deserves notice, as it shews that the statutes of the greatest consequence at this time were little known to the generality of the subjects. Waste had been expressly forbidden by Magna Charta, as well as by the 3 Edw. I. cap. xxi. and yet we find that these statutes either were not known, or not considered as binding, for it was expected that the penalties might be evaded, if express notice

[y] It is to be wished, that the fictitious proceedings in the common action of an ejectment were altered: no client can possibly be made to comprehend the reason of such fiction: if it is answered that there is no occasion for his understanding it, I still insist that mystery should always be removed, especially when no one bad consequence can be suggested from such an alteration. Fabian Philips, in his Treatise on Capias's and Process of Outlawry, gives this account of the introduction of the *lease* and *release*, used by our conveyancers: "It was first contrived by Serjeant Francis Moore, at the request of the Lord Norris, to the end that some of his relations should not know what settlement he had made;" p. 115.

was

was not given by a writ to forbid the committing waste. It is a necessary maxim in all laws that ignorance shall not excuse; and yet, before the use of printing, it was in many cases attended with hardship, as it is even at present, from the multiplicity of penal statutes. The Year Book of 39 Edw. I. T. Pasch. lays it down that the reason, why no one should be allowed to say he hath not been acquainted with the law, arises from the fiction of every person being represented in parliament.

“I know that most of the statutes are printed; but it does not appear that every man is bound to buy the book of Statutes, nor to search at the Tower, nor to understand the language in which they are written [z].”

C A P. XXV.

QUIA non est aliquod breve in Cancellaria, per quod querentes habent tam festinum remedium, sicut per breve nove disseisine, dominus rex volens ut celeris fiat justitia, &c.] The remedy by this, or any other writ of assise, is now seldom used, but was formerly common [a], from the greater expedition in attaining the right. Lord Coke [b] informs us, that it was called an assise of *novel disseisin*, in opposition to an *ancient disseisin*. The justices in eyre [c] at

[z] Hobbes's Dial. between a Lawyer and Philosopher, Works, p. 599. ed. 1750.

[a] One volume of the Year-Books entitled, *Le Livre des Assises*, contains chiefly decisions upon writs of this kind. Assise is likewise one of the principal heads in Fitz-herbert and Brook's Abridgement.

[b] In his first Institute.

[c] I find by a record of the tenth of Edward the First, that the justices in eyre were obliged to attend the parliament. They write therefore to the bishop of Bath and Wells (then chancellor) to know the king's pleasure, whether they should not adjourn the eyre in Cornwall, as it was so distant from Westminster that they should not be able to be present at the parliament which was then summoned. The justices indeed mention
another

at this time went their circuits but once in seven years; therefore a disseisin committed before the last eyre was called an *ancient disseisin*, whereas that committed after it was called a *novel disseisin*. The reason why assises were more expeditious than other remedies, arose from no *essoins* being allowed in them, and likewise that in an assise the jury is to appear as soon as the defendant; but in other original writs no jury is to be returned, till the parties have appeared, and are at issue. This chapter, in every part of it, speaks with proper warmth against delays in procuring justice. Thus also an ordinance of Charles the Seventh of France, in the year 1454, directs, "Que les matieres possessoires, et de *novel disseisin*, seront decidées le plus brief que faire se peut; car autrement, par la longueur des plaidoiries, les procès seront *quasi immortels* [d]."

It appears by this chapter, that the sheriff used to take an *ox* both from the *disseisee* and the *disseisor*: his claim upon the *disseisee* probably arose from the restoring him to possession; the statute however very properly directs, that for the future he should only claim this fee from the *disseisor*, who was certainly the person to be punished; and it likewise enacts, that, if there are more disseisors than one named in the writ, the sheriff shall only be antitled to *one ox*. From this a very strong argument may be drawn against the practice in many officers, who, when the names of many persons are inserted in one instrument, are but too apt to charge separate fees.

There is a right of *tronage* mentioned in this chapter, for which a *novel disseisin* will lye. As this term does not frequently occur in our law, it may not be improper to mention, another reason in a kind of confidence to the chancellor, viz: that there had been a great scarcity; and they imagined, "*si veniamus ibidem*" (viz. into the county of Cornwall) "*macras genas reportabimus*." Petyt Mss. vol. xv. p. 24, & seq.

[d] Ord. Royales, p. 21.

that

that Du Cange says it is a right of toll for weighing goods, probably at a fair, and that *trona* signifies a pair of scales[e]: he likewise derives Troy-weight from this word; how justly I will leave to etymologists. From ignorance of this term, *tronour des laines*, which occurs in the thirteenth chapter of the first of Henry the Fourth, is translated *finder*, and not *weigher* of wool.

CAP. XXX.

ITEM ordinatum est quod justitiiarii ad assisas capiendas assignati, non compellant juratores dicere precisè, si sit, disseisina vel non; dummodo voluerint dicere veritatem facti, et petere auxilium justiciariorum: sed si spontè velint dicere quod disseisina sit, vel non, admittatur eorum veredictum sub suo periculo.] The latter part of this chapter shews, that the contest between judges and juries was of a very different nature at this time, from what it hath been of late years. The reason of this arises from what I have before observed, with regard to its being very common anciently to bring attaints against juries, and an angry or dishonest judge therefore drove them to the finding an improper verdict, in order to subject them to this severe prosecution; "*admittatur eorum veredictum sub suo periculo.*" As this law is unrepealed, there can therefore be no doubt but a jury may find what verdict they please, and the misfortune is, that they run no risque at present of an attainnt; there is however generally such moderation in juries, that they seldom abuse this liberty.

[e] There is at Edinburgh a church which is called the *Trone-Church*, and probably from the *trona*, or public scales, having hung opposite to it. There is likewise in the *Rolles Gascoignes*, published by Carte, a record thus entitled, *De officio tronagii, et pesagii lanarum*," p. 269. which agrees with Du Cange's signification of the word. In the North of England, the stilyard, with which butchers meat is weighed, is still called the *trones*.

This

This chapter is generally called the Statute of *Nisi Prius*; it relates to actions depending *in utroque Banco*, without any notice of the court of Exchequer; nor is there any mention in 14 Edw. III. cap. xvi. (which likewise regulates the authority of justices of *Nisi Prius*), but only of the Chief Baron of the Exchequer. This is a further proof of what I have before observed in the comment upon Magna Charta, that the Barons of the Exchequer were not anciently considered, as having the same office or powers with the justices of the King's Bench and Common Pleas [*f*].

CAP. XXXIII.

QUIA multi tenentes erigunt cruces in tenementis suis, aut erigi permittunt, in prejudicium dominorum suorum, ut tenentes per pri-

[*f*] There is, amongst Mr. Petyt's manuscripts, an answer drawn up by one *Fanshaw* to some queries of Lord Buckhurst, with regard to the offices in the Exchequer. By this it appears, that, in the time of Queen Elizabeth, the fourth baron was that baron who is now called the Curfitor Baron; the offices of the Lord Chief Baron, the second and third baron, are stated also as being distinct. The barons of the Exchequer did not rank so highly as the justices of the King's Bench and Common Pleas, as *Robert Shute* * was appointed second baron, in the twenty-first year of Queen Elizabeth, with all the privileges and precedence of the justices of either of those courts. See Dugd. Orig. Jur. "*Robert Shute* constit. "*secundus Baro, et quod reputabitur, et erit in eo ordine, gradu, estimatione, dignitate et præheminentia ad omnes intentiones, prout aliquis inferior Justiciarius de Banco vel de Communi Banco est vel esse debet. Teste R. apud Westm. 1^o Junii.*" Pat. 21 Eliz. He was afterwards, however, in the twenty-seventh year of Queen Elizabeth, appointed one of the justices of the King's Bench. Ibid. Mr. Selden observes, that the Barons of the Exchequer were so called, because they were anciently made from such as were barons of the kingdom, or parliamentary barons. The same reason is given for the appellation of barons of the Cinque Ports. Clarke on Coins, p. 452. citing the Titles of Honour.

* From whom I happen to be lineally descended.

villegium templariorum et hospitaliorum tueri se possint contra capitales dominos feodorum: statutum est, quod hujusmodi tenementa capitalibus dominis aut regi incurrantur, eodem modo quo statuitur alibi de tenementis alienatis ad mortuam manum.] This abuse of the Knights Templars, together with another (provided against by the 43d chapter of this law) of declining determinations in the king's courts, as also their large endowments [g] and riches, seem to have been the cause of the dissolution of this Order, in the following reign [h], rather than the crimes of which they were accused. Many learned men have written in defence of them, particularly Mariana, Boccace, and Dupuy [i]: Stubbs likewise asserts, that they had done nothing which deserved this persecution; Voltaire says, "Que deux cent temoins les accusèrent de renier Jesus Christ (en entrant dans l'ordre) de cracher sur la croix, et d'adorer une tête dorée montée sur quatre pieds, et que le novice juroit de s'abandonner à ses confreres." This agrees with the charge likewise in Dugdale's Monasticon [k], where the examinations are printed; but the proof is very defective. Their exclusive privileges were equally inconvenient in other parts of Europe [l], and produced the same

[g] "For wealth is crime enough to him that's poor." Denham.

[h] There is in Cox's History of Ireland, p. 89. an order to Sir John Wogan, Lord Deputy, in the year 1307, to suppress the fraternity of Knights Templars. The most complete collection perhaps of what relates to the abolishing this Order is to be found in the Petyt Mss. vol. xxi. p. 50, & seq. They were so persecuted in the time of Edward the Second, that a valet of this king, whose name was *Auger*, and who had made a vow not to clip his beard, obtained a writ of privy seal, certifying, that though he wore his beard in this manner, he was not a Knight Templar. Ibid. p. 50.

[i] *Puteanus* in Latin. See likewise Mariana's Hist. de Espan. vol. i. p. 597. Madrid, 1669.

[k] Vol. ii. p. 559.

[l] Sir David Dalrymple mentions, that the Crusaders had so many
and

same persecution of the Order. The writers in defence of the Jesuits attribute their present troubles to the same causes.

CAP. XXXIV.

PURVEU est, que si homme ravisse femme, espouse, damoiselle, ou autre femme desormes, par la ou elle ne se est assentue, ne avant, ne apres, eit judgement de vie et membre. Et ensement par la ou homme ravist femme, dame, espouse, damoiselle, ou autre femme à force (tut seit ke ele se assente apres) eit tel judgement comme avant est dit.]

This is the only chapter in the old law French, in this whole statute, which consists of fifty chapters; and, what is still more singular, the latter part of this chapter is in Latin. It likewise makes a very extraordinary distinction between a rape, and a rape *by force*, which at first seems unintelligible, but receives an explanation by some writers on the French law, who make the *rapt* and *viol* different crimes. The first of these was only a seduction of a ward, with intent to marry her, which is a misdemeanor; the *viol* on the contrary is what we understand by the word *rape*, and is punished capitally. This distinction likewise accounts for the difference of opinion amongst our writers on the criminal law, whether rape was a felony or not before this statute. The *viol* or rape was felony with us, as in France; the *rapt* (or seduction) was not [m]. Stiernhook makes the same distinction

and such extensive privileges, that it was often necessary to renounce them in contracts, “Renunciantes omni privilegio, maxime cruce signatorum et cruce signandorum.” Chart. Morav. vol. i. p. 102. Canons of the Church of Scotland in 1242 and 1269, p. 19. Edinburgh, 1769, 4^{to}.

[m] Vouglans, who is an author of some repute, on the criminal law of France, in his chapter on the *viol*, cites this determination from Brunau, who hath likewise written a treatise on the same subject.

“Je r’apporte de Brunau à ce sujet un exemple memorable, qui fait assez sentir combien cette preuve est dangereuse, et equivoque (sc. de Viol),

distinction, in the old Swedish law, between the *vis* and *raptus*.
 “*Raptus* in volentes etiam committi potest, *vis* non nisi in no-
 “lentes; illius poena exilium fuit, hujus etiam vitæ suppli-
 “cium [n].” By some of the antient laws of Europe, the con-
 sent of the woman ravished, after the rape, purges the offence;
 by others not. By the law of Scotland, the consent afterwards
 prevents the punishment of the criminal [o]; with this agrees
 that of Bretagne [p]: on the contrary, by the English and many
 other laws, the consent afterwards does not alter the crime.

Great attention is shewn, by some of the old laws of what are
 called barbarous nations, to the protection of the chastity of wo-
 men: “Si qua foemina vadit in itinere inter duas villas, et ob-
 “et combien le juge doit se tenir en garde contre ces fortes d’accusations.
 “Un juge ayant condamné un particulier, qu’une femme accusoit de
 “viol, à lui donner une certaine somme par forme de dommage et intérêts;
 “il donna en meme tems à ce particulier la permission d’enlever à cette
 “femme l’argent qu’il venoit de lui donner, ce que le jeune homme n’ayant
 “pû faire, à cause de la résistance vigoureuse que lui opposa cette femme;
 “le juge ordonna à cette dernière de restituer la somme, sur le fondement
 “qu’elle auroit pû encore mieux défendre son corps que son argent, si
 “elle l’eut voulu.” Vouglans, p. 498. Paris, 1757, 4^{to}. It is amazing
 that it should have escaped these two writers (as well as perhaps the
 French courts of justice), that this case is in circumstances and terms pre-
 cisely one of Sancho’s most famous decisions whilst governor of his island.

[n] De Jure Sueorum Vetusto, lib. ii. cap. ix.

[o] Ersk. Inst. p. 482.

[p] Rape is punished with death by the laws of *Bretagne*, if the woman
 is not a public strumpet; or, though a public strumpet, if she lives with
 her husband. D’Argentré, p. 2050. One of the Venetian statutes, on
 the other hand, speaks in terms of resentment against this charge by a
 prostitute, dando fede a la sua semplice querela, cosa in vero che dà
 “grande mormoration a tutti.” Ordin. of the 20th June, 1520. Stat.
 Venet. Venetiis, 1729. p. 21. A. inter Leg. Crim. Forbes, in his
 Institutes of the Scotch law, lays it down, that a woman may be con-
 victed of ravishing a man, vol. ii. p. 125. Glanvill seems to suppose the
 same. See l. 14. c. 6.

“viavit cum aliquo, et per raptum denudat caput ejus, vi fol.
 “mulctetur; si ejus vestimenta levaverit, ut usque ad genitalia
 “denudet, vi fol. solvat; et si eam denudaverit, ut genitalia ejus
 “appareant, vel posteriora, xii fol. solvat [q].” In the warm
 climates of Spain and Italy, less injuries, or even the approach to
 a woman is made penal. There is a law of the Wisigoths “ne,
 “absentibus propinquis, mulierem medicus phlebotomare præ-
 “sumat [r].” By a Neapolitan ordinance, in 1571, this is still
 carried further, and it is made a capital crime in those, “che per
 “forza baciassero le donne, anche per sotto pretesto di matrimonio [s].”

No law however goes so far in the punishing this offence, as
 the following: “Si in domo aliquâ vis feminæ adhibetur, capita
 “violatoribus amputari debent, et præterea quicquid brutorum
 “in domo est occidi debet, scilicet pecora, feles, canes, anseres,
 “et gallinæ [t].” It should seem from this, that it was thought
 incumbent upon the geese to have defended the women at least
 by their cackling, and that the Germans had heard of the capi-
 tol’s having been saved by the timely warning of this animal.

By the ancient laws of the Ægyptians, the ravisher was pu-
 nished in the offending part: *τὸ μὲν γὰρ βιάσαμεναι γυναῖκα ἐλευθεραν,*
προσελάξαν ἀποκοπῆσθαι τὰ αἰδαῖα [u], as also about the year 1086,
 in this country [w].

It

[q] Lindenbr. Leg. Alemann. p. 378.

[r] Lindenbr. p. 203.

[s] Giannone, vol. iv. p. 249.

[t] Speculum Suevicum, cap. cclii. § 1, 2.

[u] Diodorus Siculus, l. i. c. lxxviii.

[w] Saxon Chron. p. 190. 7 7if hþilc caplman hæmðe 7ð pimman
 hipe unðance7, 7ona he 7oplear 7ða limu 7ðe he mið pleazode. Which
 Bishop Gibson gives the sense of by rendering the latter words, *privatus*
fuit genitalibus: but I think that Mr. Lye is not so happy in his Anglo-
 Saxon Dictionary, when he translates them *cum quibus lufit*, as pleazode
 here implies an abusive injury. The punishment indeed of castration, as
 also,

It hath always been required in most parts of the world, that the complaints for this offence should be made within a certain time. Thus by the laws of Navarre: "*Las mocas y doncellas destrupadas non puedan pedir su virginidad o estrupo, sin dentro de quatro meses despues que fueren desfloradas, o que a solo su dicho dellas non se de fe ninguna ni credito [x].*" By the Sicilian Constitutions, the complaint should be made in eight days: by our law no particular time is fixed for the accusation; but, if not recent, it always affords the strongest argument of presumption in favour of the person accused [y].

This part of the statute having made it felony in the man to commit a rape, suddenly changes from French to Latin, and enacts, "*Si uxor sponte reliquerit virum suum, et abierit, et moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, nisi vir suus sponte et absque coërtione ecclesiastica eam reconciliet et secum cohabitare permittat.*" The occasion of this sudden change of the language, and in the middle of a chapter, probably arose from what I have before observed, that, when a law relates to the interests or concerns of the clergy, it is generally in Latin. Now adultery and fornication are only offences of spiritual conusance, and never were criminal in this country either by the common or statute law, but in the time of the also of putting out the eyes, seems to have been very common in the same century for the offence of stealing, to which succeeded the cutting off the right-hand. See the Saxon Chronicle.

[x] P. 256.

[y] There is a very singular law of the kingdom of Arragon with regard to rapes: "*Nulla puella audiatur super virginei pudoris violentia, si per unum diem et noctem tacuerit. Si probatur violentia, vir debet cum eâ contrahere si sit par; et si par non fuerit, donec et talem virum qualem habere possit ante violentiam factam.*" *Fueros del Reyno de Arragon*, p. 164. The child of a woman, conceiving after a rape, is legitimated by the ancient laws of Sweden, and the child is called *brukbarn*, i. e. *filius lactæ*. *Stiernhook*, l. ii. c. ix.

common-

commonwealth, and protectorate. By an ordinance, in 1650,

Veneri Martique timenda,

it is made felony, without benefit of clergy, in both man and woman, to commit adultery or fornication [z]; the first offence is punished with imprisonment for three months, and the second with death. These statutes could not have continued long unrepealed, even if Charles the Second had not succeeded to the throne.

Though adultery and fornication are made criminal by the laws of many countries in Europe (those of Lucca for example punish by a fine and banishment for a year), yet I cannot find any which approaches to the severity of the ordinance of the commonwealth, except a law of Sicily, "*Si quis cum volente et acquiescente viduâ stuprum commiserit, flammis ultatricibus exuretur* [a]." Joseph Scaliger says indeed, that he was at Geneva, when a very handsome and young woman was drowned for this offence [b]. The execution according to his account drew tears from the eyes even of the Calvinist ministers. The Ægyptian punishment was whipping the adulterer, and cutting off the nose of the adulteress; probably, that she might not occasion the same crime for the future [c]. It should seem, that it was not unusual to burn the widow

[z] It hath been suggested to me by a person of great learning, that, on a literal construction of this ordinance, fornication may not be punished as a felony. I admit, that there might be an opportunity of making this objection on the part of the criminal, but (not to mention other reasons) it was certainly otherwise understood during the protectorate. See the Index to Scobell, printed in 1658, by permission of the protector (title, *Fornication*). Dio Cassius informs us, that some of the Roman senate, to pay their court to Julius Cæsar, had thoughts of proposing a law which gave him an indemnification against prosecutions for this offence: ἀμειβανταί και γυναιξιν δοταίς αν θεληση, εἰσληψαν τινες επιρρησαι. l. xlv.

[a] Const. Sic. p. 251. Panormi, 1637, Fol.

[b] Scaligerana, p. 3. Cologne, 1667.

[c] Diodorus Siculus, l. i. c. lxxxii.

thus

thus offending by the Jewish law; at least *Judah* proposes to punish *Tamar* in that manner [d].

C A P. XLII. & XLIV.

DE marescallis domini regis, de feodo camerar', custod' hostiorum in itinere justitiariorum:—ordinatum est quod de qualibet assisa et jurata quam custodiunt, capiant decem denarios tantum, et de cirographis nichil.—De his qui vocati sunt ante justitios ad defendendum placitum suum nichil capiant pro ingressu vel egressu, ad placita coronæ de qualibet duodenā XII denarii tantum capiantur.] I have in the text taken part of the 42d chapter and part of the 44th, which both relate to fees claimed by certain officers, and between which a chapter relative to the Knights Templars is most improperly inserted. The chief reason of my making any observation upon this part of the statute arises from the words seeming to afford a strong inference, that the courts of law were not at this time *open courts* in the sense [e] that they are now understood so to be. An open court at present is generally so crowded by idle spectators, that no one, who hath any real business to do, can have access; or, if he procures a seat, he is not so much at his ease as those whose interests are depending have a reasonable right to insist upon. This statute therefore directs, that the plaintiff, or defendant, should pay nothing; but by implication seems to allow that those

[d] Genesis, ch. xxxviii.

[e] In the modern sense of an *open court*, the legislature could never have allowed any fees to be taken for admittance. I do not recollect to have met in any of the European laws with an injunction that all causes should be heard *ostis apertis*, except in those of the republic of Lucca. See l. i. c. x. Luccæ, 1539, Folio. In Scotland, by a statute of William and Mary, causes must be tried with *open doors*, rape, sodomy, and the like, being excepted; and I am informed, that the propriety of this regulation is found by experience, as it permits the judge and jury to ask questions with greater freedom, and prevents idle people from learning many bad lessons.

which

who probably constituted the idle part of the audience, should pay one penny each for admittance, which may be nearly equal to a shilling at present: so that, if the spirit of the law was attended to, it would, in a great measure, prevent what is now so sensibly felt as an inconvenience. The statute then enjoins the judges, in these emphatical words: "*Quod dominus rex iustitiariis injungit in fide et sacramento quibus ei tenentur, quod si hujusmodi ministri contra prædictum statutum in aliquo iverint, poenam eis infligant rationalem.*" When the servants of judges at the Old Baily, and the officers of the courts in Westminster-hall, have, upon certain occasions, taken not only a penny from the spectator, but even insisted upon gold; are they not within both the letter and spirit of this law? and is it not incumbent upon the judges to put it in execution agreeable to what is enjoined by the statute?

Other parts of the law relate to the fees of the chamberlain, who was entitled to a palfrey [*f*] *de tenentibus per baroniam*; and, if such a tenant is an abbot or prior, the chamberlain is to be contented with his upper vestment, or rather the price of it: for, says the statute, it is more decent "*quod viri religiosi finem faciant pro superiori indumento, quàm exuantur.*" These little circumstances shew strongly the manners of the times.

C A P. XLVII.

PROVISUM est quod aque de Humbre, Ouse, Trente, Daon, Eyre, Dervent, Werf, Nid, Yore, Swale, Teese, et omnes alie aque in quibus salmones capiuntur in regno, ponantur in defenso quoad salmones capiendos, a die nativitatis Beate Marie, usque ad diem Sancti Martini, et similiter quod salmoneti non capiantur, nec destruantur

[*f*] This perquisite of a palfrey was probably claimed by the chamberlain, for introducing the *tenentes per baroniam* to do homage. *Chambellage* is a considerable head of the old French law.

U

per

per retia, vel per aliqua ingenia, a medio Aprilis, usque ad nativitatem Beati Joannis Baptiste.] There are many ancient acts of parliament in the Statute book for the preservation of the salmon, and still more Scotch laws of the same import [g]: the reason of this particular attention arose from salted fish, and especially salmon, forming great part of the winter's provision, which appears, by the accounts of stores for the religious houses, in Dugdale's Monasticon. Hector Boëthius indeed informs us, that the ancient Scots lived almost entirely upon fish [b].

Not only private houses relied upon this supply, but armies at this time could not be otherwise marched or subsisted; there is, in Rymer [i], an order of Edward the Second, to provide 3000 dried

[g] By one of the Black acts, it is made penal in Scotland to take any salmon for the space of three years, which it must have been very difficult to enforce, as salmon made one of the great staple commodities of the country for exportation. There is likewise a very singular provision by an Irish statute of 11 Eliz. cap. iv. for the preservation of salmon, by which all swine, which feed on the strand where the sea ebbs and flows, are forfeited; it being supposed, by the preamble of the act, that they feed on the spawn of fish, and particularly that of salmon and eels. By one of the ordinances of the ancient Wisigoths in Spain, no person is to fish for salmon but on one side of the river, and that only to what in our law is called the *flum aquæ*, which they describe to be that half of the water, included between the bank of the river, and the greatest force of the stream. Fuero Jusgo, p. 591. There are also very minute regulations to the same purport (during the reign of St. Lewis) in France. See Ord. Royales, p. 1. In the Glossary to Le Moin's Diplomatique Theorique, mention is made, under the article NEF-CHEVALIER, of a right frequently granted in Germany by the lord to his vassal, of fishing with a small boat in certain parts of a river. Metz, 1765, 4^{to}. I do not remember to have met with elsewhere any traces of such a sort of grant. In Scotland, a right to fish for sixteen days only is not uncommon; and in some parts of England for a single day.

[b] Descr. Scotl. c. xlii.

[i] Rymer, vol. iv. See also an order of Henry the Third to the sheriff of Norfolk, to provide five lasts of herrings for the use of his palace

dried salmon for this very purpose. Thus likewise Monstrelet [k], mentioning the defeat of the English, and their convoy being taken, says, "Que grande partie du charoy des dits Anglois
 "etoient chargés de harene, et à ceste cause la bataille fut ap-
 "pellé la bataille des harennes."

The regulations of this statute were principally intended for the Northern rivers of England, which empty themselves into the Eastern sea, as appears by the name of those which are enumerated. It would be indeed highly absurd to fix the same time for all rivers indiscriminately, as those even upon the same coast, if at a considerable distance, often vary in the time of the salmons coming up to them; and, between the Western and Southern rivers compared with the Eastern, there is the difference of months. It must be admitted however that general words follow, which include all rivers in the kingdom; but I should think that the word *all*, after the enumeration of the North Eastern rivers, would receive a limited construction, as it sometimes does; for, if the Thames was meant to be included, could this parliament, sitting at Westminster upon its banks, have omitted the particular mention of it, before the other Eastern rivers [l]?

at Westminster. Petyt, Mss. vol. vii. p. 152. The Queen of Scotland likewise sends ten casks of salted salmon to the dutchess of Clarence, which Henry the Sixth directs should not pay duty. See Rymer, vol. iv. part iv. p. 196.

Lampries or lamperns were sometimes also part of the provisions for an army on its march, as appears by an order of Henry the Fifth, "De
 "lampredis pro vitellatione exercitus regis." Rymer, vol. iv. part iii. p. 36. A. D. 1418, 5 Hen. V.

[k] In his Chronicle, vol. ii. p. 251. Paris, 1572.

[l] Upon looking into the statute of 13 Ric. II. cap. xix. which recites this chapter of *Westminster the Second*, the Thames is mentioned before the Humber, &c. This shews the great inaccuracy in the citing or referring to statutes formerly, before the use of printing.

After all, these regulations are either neglected, or, if put in force, do not seem to have any great effect: there are sometimes, for many years together, great quantities of fish, and at other times an extraordinary scarcity, both the one and the other probably arising from causes which we are totally ignorant of, as we know less of the natural history of fish than of any other kind of animals. If any new law should be thought necessary, why should not the policy of the late Game act be adopted? and why should it not be penal for any person to have at his table fish in the spawning season, as well as to have a partridge or pheasant in the prohibited times [m]? It cannot however be done by a general law, as I said before; and the particular times must be settled for the different rivers.

This statute, from the many regulations which it contains, together with the statutes of Wynton, and the statutes of Labourers, Liveries, and Maintenance, were ordered to be proclaimed in every county by Edward the Fourth. This is mentioned in the Year Book of the first of Henry the Seventh [n]; but the chief justice observes, that some of the privy counsellors, who had just taken an oath to observe these laws and put them in execution before the king in council, broke through some of them *even in going down stairs*.

[m] There is, indeed, a statute of Queen Elizabeth to this purport, which every steward of a court-leet is particularly enjoined to give in charge, under penalties, 1 Eliz. cap. xvii. This law, however, seems to be much disregarded, and, probably, because all the business of a court-leet is now most commonly transferred to the quarter sessions.

[n] T. Mich. p. 3.

STATU-

O B S E R V A T I O N S
449
STATUTUM WYNTON,

13 Edw. I. Stat. ii. An. D. 1285.

THE preamble to this statute recites [o], that when murders, burnings, robberies, and thefts were committed, the inhabitants of the county were more willing to excuse the offender than to punish for the injury to a stranger: it is also stated, that if the felon was not himself an inhabitant of the county, yet the receiver of the stolen goods frequently was so, which produced the same partiality in juries, who did not give proper satisfaction in damages to the party robbed [p]. This preamble therefore shews the particular propriety of the regulation of *bue* and *cry* [q] at this time, which made the whole county answerable, and therefore took away from juries the inducement to spare their countrymen when indicted. It continues however an excellent regulation of police even at this day, when juries do not determine between the criminal and the public from the same blamable prejudices; the provisions of the statute indeed have been much neglected; and Hollinshead complains, that, in the reign of Queen Elizabeth, the constable, upon notice of a robbery, did

[o] I have given the substance of this preamble, which is absolutely unintelligible in the common translations.

[p] We do not hear at present of damages or satisfaction for a robbery, which at this time was generally prosecuted by appeal, because it entitled the appellant to restitution of the stolen goods; this satisfaction, however, was not extended to prosecutions by indictment till the statute of Henry the Eighth.

[q] Cry only is mentioned in the preamble to this statute, as also in the 6th chapter, though the English title is, *Hue and cry shall be followed*. The term *bue* properly signifies a pursuit. Thus the Count of Soisson says to King Lewis, "*lessons huer ceste chiennaile*;" or, *let us give over the pursuit of these poltroons*." Vie de St. Louis, Paris, 1761, Folio.

not consider it as part of his office to raise the country. We find, by the preamble, that it is by no means confined to the offence of robberies, as the statute hath been generally understood, but extends likewise to murders, burning, and theft. Hue and cry was an old institution in parts of France, “et plusors fois
 “avons nous commandés en nos assises, que tuit faillent à *cris* qui
 “avenront, et que cascun met pain en arrester les malfaiteurs
 “sufdits [r].” It is believed, however, that the raising the hue and cry is at present as much disused in France, as it is in England.

This law, which consists of six different chapters, relates only to regulations of Police, which is very uncommon in these *capitularia*, or collections of laws; those of Magna Charta, Westminster the first and second, containing very miscellaneous matter, without any kind of connexion. The 4th chapter directs, that the walls of the great towns shall be shut from evening till the morning, and that watchmen shall patrol the streets; the 5th, that the highways shall be cleared of wood to the breadth of two hundred feet, in order to prevent the felon’s concealing himself [s]: the 6th and last directs, that every man shall, according to his substance, have arms in his house, in order to pursue the felon effectually; the constables also are ordered to view the houses at stated times, in order to see whether the owners have provided themselves with such proper weapons [t].

There are so many mistakes in the original French, or translation of this statute, that I shall here take notice of them: in the 3d chapter, *chescun vile* is translated *every country*; but it

[r] Beaumanoir, cap. lxvii.

[s] The word, in the original, is *taper*, which properly signifies to hide himself like a mole. In the Year Book of 4 Edw. IV. T. Pasch. the term of *entabis sous la terre* is applied to Humphrey de Nevil, who had thus hid himself in Northumberland after a rebellion.

[t] This is the first instance of a power given to officers to enter a house, in order to see if a parliamentary regulation is put in execution.

should

should be *every town* or village, as the word *vile* is rendered in the following chapter. The translation of the beginning of the 4th chapter is indeed very intelligible, but it by no means follows the original, the meaning of which is obscure, and should probably be thus understood: *Nor shall any one lodge in the suburbs of the town, if NOT in the day-time; nor even in the DAY-TIME, if his host will not answer for him.* In the 5th chapter, the wood is ordered to be cleared in the highways, "*iffint que cet estatut ne extende pas as keynes, ne as gros fufz [u]:*" this is translated, shall not extend to *ashes*, nor to great trees. Now *fresne* is the French word for an ash, and therefore *keyne*, used in the statute, signifies an *oak*, instead of an *ash*; though it is admitted that an *ash*, from the thinness of the foliage, is less likely to conceal a robber than an *oak*. At the latter end of the same chapter, he who makes a park is ordered to fix his wall "*atant quil joyt la leeste de deux cens pies pres del haut chemein.*" This word *joyt* should most clearly be *soyt*, and the translator hath entirely omitted the words *la leeste*, or *at least*. In the 6th and last chapter, the word *chapel de fer* is translated a *breast plate*, which can mean no other part of armour than a *helmet*. Cotgrave, in his Dictionary, takes notice, that *chapel* signifies the same with *chapeau*; and Du Fresne says, that *capellus* is synonymous with *galerus* or *pileus*. Ariosto likewise uses the word *cappel* in the same sense:

[u] *Fuz* or *fust* is an ancient Celtic word, signifying both a forest and wood:

" O createur, O maitre !
 " Dis moi a cette fois,
 " De quel bois voulut etre
 " Le fust de la vraie croix."

Ancien Cantique, cited by Lacombe, in his
 Dictionary of the old French.

" Perche

"Perche ne targa, ne *cappel difende*,

"La fatal *Durindana* [w], ove discende [x]."

The compiler of the Glossary to Geoffrey de Ville-Hardouin hath the following article on *chapel de fer*: "Espece de casque en forme de chapeau, duquel les chevaliers se servoient hors le combat, pour prendre haleine; a cause de la trop grande pesanteur des heaumes, qui leur accabloit la teste [y]."

[w] A famous sword of one of Ariosto's heroes.

[x] Orl. Fur. Canto xii.

[y] Inter Byz. Script. Venet. 1729.

STATUTA CIVITATIS LONDON [2],

Edita apud Westm' anno 13 Edwardi Regis, Stat. v. A. D. 1285.

THE statute of *Circumspectè agatis*, as well as the statute of *Merchants*, already taken notice of in what hath been said on the statute of *Aston Burnel*, follow next; but I shall make some observations upon the present law (or rather perhaps proclamation) out of its order, as it relates to police, and passed the same session with the statute of *Wynton*. Whether from this act's being local, or from what other reason I cannot pretend to conjecture, this statute hath never been translated, though it contains some very curious particulars. The preamble states, that there were both by night and day continual affrays in the streets of London; it therefore directs, that no one "soit si hardi etre truve alaunt, ne *batraunt* [a] parmi les rues "apres cover feu [b];" that no arms of any kind should be carried,

[2] London was at this time (as it hath continued since) the metropolis of this island. Fitz-Stephens, who wrote in the reign of Henry the Second, says, that this city could then raise 20,000 horse and 60,000 foot; and that when the citizens of other towns were styled *Cives*, the Londoners had the appellation of *Barones**: their liberties therefore make an express article of Magna Charta. Fuller, in his English Worthies, says, that foreigners often conceive London to be the island, and England the metropolis.

[a] I conjecture *batraunt* to signify the same with *barreterant*, or quarrelling; the French is very corrupt, and the Glossaries give no light.

[b] Curfew is written Curphour in an old Scottish poem, published in 1770, with many others from the Ms. of George Bannatyne, who col-

* From their being anciently thus styled, the aldermen, in the time of James the First, insisted upon precedency in London to knights who were of an elder creation. Petyt Mss. vol. xliv. p. 76. in which volume many other points of precedence are settled upon references to the earl marshal. See also Menage's Dictionary, under the article BARON.

ried, but by a *grant seigneur, ou autre prodome de bone conyssaunce*; and even if such a person was in the streets during the night, he is enjoined to have a light with him [c]; the punishment for offending against this part of the law is, that the conservator of the peace shall send him for that night to the *Tonel*, which word I cannot find in any of the Glossaries; it certainly means however the same with the *Round-house*, and was either anciently an old butt or hoghead, or something built in the shape of one. We still retain the name of *Round-house* for this *temporary gaol*, though sometimes they are octagon or hexagon buildings, as that at the end of the New Church in the Strand, and another in the Church-yard of Westminster-Abbey. As this punishment should subject the person confined to ridicule, it might not perhaps be amiss to restore the original hoghead, instead of these more elegant and modern buildings.

lected them in the year 1568. It is observed, in the annotations on these poems, that, by Act 144 Parl. 13 Jam. I. this bell was to be rung in boroughs at nine in the evening; and that the hour was afterwards changed to ten, at the solicitation of the wife of James Stewart, the favourite of James the Sixth. *Shakspeare* seems to be the only writer, who hath tolled the Curfew at the break of day:

“ the second cock hath crowed,

“ The *Curfew* bell hath rung, 'tis three o'clock.” *Romeo and Juliet*.

We find the *coverfeu* is here mentioned as a common and approved regulation; it was used in most of the ancient monasteries and towns of the North of Europe, the intent being merely to prevent the accident of fires: all the common houses consisted at this time of timber; Moscow, therefore, being built with this material, generally suffers once in twenty years. That this happened equally in London; see a citation from Fitz-Stephens, in note [d]. The Saxon chronicle also makes frequent mention of towns being burned, which might be expected for the same reason, the Saxon term for building being *getimbran*.

[c] There is a general vulgar error, that it is not lawful to go about with a *dark lantern*: all popular errors have some foundation, and this regulation may possibly have been the occasion of it.

The

The next regulation is, that no tavern, in which either wine or beer is sold, should receive guests after *coverfeu*. This might have been well intended by the legislature; but it probably was the occasion of greater drunkenness, as, to evade it, they were obliged to begin their debauch earlier [d]. The penalty upon the tavern-keeper for this offence is remarkable, as the fine is increased even to the *fourth offence*; and I do not recollect any other instance of a statute going beyond the *third*.

There were however deeper causes of these affrays and tumults in the streets than the resort to taverns, as the inhabitants of this country were formerly much more vindictive than they are at present: the number of different statutes against going armed, or wearing liveries, are strong proofs of such a disposition and temper; maihem also makes a considerable head of the ancient criminal law, which is an offence we hardly ever hear of at present; and Bracton mentions castration as not an uncommon crime, for which the punishment was either death, or banishment [e]. The obtaining deeds by violence or duress is likewise frequently dwelt upon in the old law-books; and one of the articles formerly given in charge was, *de corruptentibus vel amoventibus divisas*. Riley [f] mentions an intolerable and increasing grievance of prosecuting by appeal in the name of infants, “par queux ils sont emprisonnes et mult grevez;” which occasioned the 31 Edw. I. Stat. ii. entitled, *A Definition of Conspirators*. Many of the old writs in the Register likewise prove this, as the writ *De manso obsessio per quod terra fuit inculta*;—*Quod fenestras in minutas partes secuit*,—and *Quia tenentes non audent morari super*

[d] Fitz-Stephens, therefore, after dwelling much upon the praise of the city of London, and its inhabitants, admits “*solæ pestes Londoniæ sunt stultorum immodica potatio, et frequens incendium*.”

[e] Lib. iii. cap. xxiii.

[f] In his Pl. Parl. p. 292.

terris suis [g].—These are injuries *non nostri generis, nec sæculi*: notwithstanding therefore the general inclination to decry every thing modern, I cannot but imagine, that the inhabitants of this country are, in the eighteenth century, infinitely more virtuous than they were in the thirteenth; as the improvements of the mind as well as regard for social duties keep pace commonly with the increase of learning and commerce; nor have I scarcely a doubt, but that, if any thing like a regular government continues in this island, succeeding ages will not only be more refined and polished, but consist of still more deserving members of society [b].

At the end of this statute, the king is enabled to make what alterations, from time to time, he shall think proper in these regulations; and the same power, though it might alarm at present, was given to Henry the Eighth, by the act of Union between England and Wales, till repealed by the statute of James the First.

There is a period at the end of this law, which, as it is printed in all the editions, is absolutely unintelligible, “Le rey

[g] It appears by the lately-printed Rolls of Parliament, that this assembly seldom opened without a proclamation in the *Great Hall, at Westminster*, against rioters, and particularly *rude boys*, who used to pull off people's hats, who resorted to parliament.

John of Salisbury, speaking of his countrymen in the time of Henry the Second, says,

“Gens penetranda tibi, prælargæ, bibaxque, loquaxque,

“Et cui ni morem gefferis, hostis eris:

“Emergunt lites modicæ, quas magna sequuntur

“Jurgia, vulneribus foeta, necemque ferunt.”

Prefatory Verses to the Polycraticus.

[b] I would ask those, who think otherwise of the comparison between ancient and modern times, whether they suppose that, in the thirteenth century, any one would have thought of sending 100,000*l.* to the inhabitants of *Lisbon* after the earthquake, or would have subscribed to cloath the French prisoners?

“pur ceo que les mynyftres foient ou cefte enquirelez devant les
“*avotours* des plaintes:” this ſhould be read *ont été enquireles*
&c. As for the ſignification of the words *avotours des plaintes*,
it is explained afterwards to mean the ſame with *auditours des*
plaintes; what the jurifdiction or office of theſe auditors was,
however, I muſt own that I cannot find any traces, though they
ſeem to have been what were afterwards ſtyled *Masters of Requests*.

STATUTA CIVILIA LONDON. 1581

THE STATUTE OF CIRCUMSPECTE AGATIS,

Made 13 Edw. I. Stat. iv. A. D. 1285.

SIR EDWARD COKE exprefs lylays it down that this is a statute; that the words "*Circumspectè agatis de negotio tangente episcopum Norwicensem et clerum,*" are only put by way of example, and that they extend to the clergy in general. Prynne [i] strongly opposes this opinion of Sir Edward Coke's, and it should seem upon good grounds. One of Prynne's arguments is, that this statute is not mentioned as a law by any of the chroniclers of the time, and particularly by Thomas Walsingham. This assertion hath been found to be true; but Walsingham, though he does not take notice of it as a law, yet furnishes us perhaps with the real occasion of making this supposed statute; and this historical account seems to shew, that it was probably a writ, or rather instructions, sent by Richard the Second to the judges, than a statute of Edward the First. The bishop of Norwich had preached up a crusade, in opposition to the king, and with such effect, that the Parliament diverted a fifteenth, granted *pro bellatoribus conducendis*, to this bigot's expedition against the pretended Pope [k]. The king afterwards issued a writ of *ne exeat regno* to this turbulent ecclesiastick, which he would not obey; and therefore says the Chronicle, "*Rex cepit temporalia episcopi Norwicensis in manus suas, eò quòd inobediens erat voci ejus,*

[i] Records, vol. iii. p. 336.

[k] See Thomas Walsingham, in *Anglica Norm.* p. 296, & seq. It was a crusade against a pope, which the greater part of Europe did not acknowledge. Robertum olim Cardinalem Basilici, vulgariter dictum "*Gibenen Antipapam.*" *Theatr. Crim.* vol. iii. p. 56. amongst Mr. Petyt's Mss. where the proceedings against this Bishop of Norwich are very fully stated.

“quando (ut præmisimus) revocavit eum per breve suum, cum
 “paratus esset ad transfretandum, sed tamen episcopus re-
 “dire noluit.” This seems to explain the occasion of is-
 suing this writ, and indeed the initial words of it; for, as this
 bishop was popular, it was necessary that the king, having seized
 his temporalities, should direct his officers “circumspectè agere
 “de negotio tangente episcopum Norwicensem, et clerum.” As
 for the word *clerum*, which is here added, I should conceive that
 it means this bishop’s own chapter[*l*], who might probably be
 desirous of extending the jurisdiction of the ecclesiastical courts,
 on the articles recited in this supposed law. The common trans-
 lation of the statutes, therefore, renders it properly “the bishop
 of Norwich, and *his clergy*,” not the body of clergy in general.

Abstracted indeed from this explanation from Thomas Wal-
 lingham, by what rule of grammar or construction can a law,
 which only mentions the bishop of Norwich and *his clergy*, be ex-
 tended to all ecclesiasticks in general[*m*]? By the same rule of
 construction, the statute of regulations for the city of London,
 which I have already had occasion to observe upon, might be ex-
 tended to all the great towns in the kingdom[*n*].

[*l*] Thus, in the Chronicle of the Abbey des Fontaines, “*clerum no-
 “bilissimè auxit, ac regulari ordine secundum egregii patris Benedicti
 “normam, ut vitam degerent, multipliciter decertavit.*” D’Achier, Spic.
 vol. iii. p. 234. where the word *clerus* most evidently is confined to those
 who belonged to that Abbey.

[*m*] If it be contended, that the word *clerum* does not signify the chap-
 ter, but the whole body of the clergy; this is contrary to a rule in the
 construction of Statutes, “*that, if particular words are followed by those
 “which are more general, the more general words shall receive a confined
 “construction:*” as what is first mentioned must be supposed to have been
 chiefly in the contemplation of the legislature.

[*n*] There is considerably more of this statute in the original Latin than
 hath been translated by the editors of the statutes.

ORDINATIO PRO STATU HIBERNIÆ,

Anno 17 Edw. I. A. D. 1288.

IT is very singular, that, though this ordinance hath found a place amongst the English acts of Parliament, the collection of Irish statutes, printed by authority at Dublin, begins only with the ordinances of *Kilkenny*, in the third year of Edward the Second. There can be no doubt, however, that this statute extends to Ireland, if not repealed by some Irish act of Parliament; as by *Poyning's* law, in the time of Henry the Seventh, all precedent English statutes are made to bind in Ireland.[o].

Notwithstanding what hath been said by many historians of the total submission of Ireland to Henry the Second, Sir John Davis very properly observes, that this supposed conquest did not extend much further than the neighbourhood of Dublin: for with what propriety can a country be said to be subdued, where the conqueror cannot enforce his own laws and regulations? It was by very slow degrees only that the Irish were civilized and brought to a state of submission. *Froissart* gives an account of a very singular conversation, which he had with *Henry de Bastide*, who was an equerry to Richard the Second, and attended him in his expedition to Ireland. This Bastide was, in his youth, a retainer to an earl of Ormond; and, by a fall from his horse on an attack of the wild Irish, was taken prisoner by them, continued

[o] Subsequent statutes only bind, if Ireland is mentioned. As for Wales, all statutes are now made to extend to it, whether it is specially included or not, by a clause inserted in the middle of 20 Geo. II. cap. xlii. the title of which is to explain and amend *the Window-Tax Act* of the same year. Mr. Cay, in his very accurate Index, hath very fortunately taken notice of this law, under the title of *Wales*; otherwise the principality might possibly still continue in ignorance of it.

seven years in captivity, and married a daughter of one of their chieftains. By this means he spoke the Irish as fluently as he did English, and was pitched upon, by Richard the Second, to attend four Irish kings, who came to do homage to him whilst he was in Dublin. The whole account of their reception and entertainment very much resembles that which we have shewn lately to Cherokees: "Et estoient les quatre roys tres richement vestus" (at the expence of the English) "et s'affirent ce jour à la table du roy Richard" (before this he mentions, that every thing was in common between these kings and their servants), "et devez scavoir quils furent multes regardez des seigneurs, et de ceux qui la estoient, et à bonne cause, car ils estoient moult esfranges, et hors de contenance des ceux d'Angleterre, et d'autres nations, et nature s'encline volontiers à veoir choses nouvelles; et pour lors certainement (Messire Jehan [p]) c'estoit grande nouveauté à veoir ces quatres rois d'Ireland. Messire Henry (respondy Je alors, &c.)." The same author afterwards says, that the cause of these four kings [q] being willing to do homage to Richard chiefly arose from his bearing the arms of Edward the Confessor, which are "une croix portencée d'or et de gueules, à quatre colombs blancs au champ de lescu et de banniere," instead of the arms of England, which were then *Leopards*, and not *Lions*.

Much later than this, in the year 1446, a parliament was held at *Trim*, in which they were directed not to suffer their beards to grow on their upper lip, nor to wear shirts stained with saffron [r]. *Spenser* likewise, in his Dialogue upon the State of Ireland,

[p] Jehan Froissart, to whom Baftide speaks. Froissart, t. iv. p. 204, & seq. printed at Lyons by Jean de Tournes, without date.

[q] Their names may be seen in Froissart.

[r] Notwithstanding an Irish statute of Charles the First, that *opprobrium* of the Irish with regard to ploughing by the horses tails still continues in the North-Western parts, as it does in the N. W. Highlands of

land, says, that, in the time of Queen Elizabeth, they let their hair hang so far over their faces, that it was difficult to distinguish one from another, which greatly favoured their thefts and rapines on the English. Fynes Morryson also, who, by being secretary to the earl of Mountjoy whilst lord-lieutenant of Ireland, and attending him during the war with Tyrone, saw a great deal of the manners of the wild Irish in the time of Queen Elizabeth, thus concludes his account of them: "To conclude, not only in
 "lodging passengers not at all, or most rudely, but even in their
 "inhospitalitie towards them, these wild Irish are not much unlike to wild beasts, in whose caves a beast passinge that way
 "may perhaps find meate, but not without danger to be ill-enter-
 "tained, and perhaps devoured of his insatiable hoste [s]." He afterwards adds, that the shirts stained with saffron, which I have before taken notice of, were worn by them without any change till they dropt off their backs [t]. There was indeed a statute

Scotland; it arises, I should imagine, from not being able to purchase collars or other more convenient harness: as for the barbarity; the custom which prevails in *Somersetshire*, and the North of England, to pluck the feathers from live geese, seems to equal it. There is an Irish statute likewise against the practice of tearing the wool off the back of live sheep, instead of shearing; as also against burning the corn*, instead of threshing it. I have heard that this continues in some of the Western parts of Ireland, and the North of Scotland. Burning the corn is also the practice in many parts of Asia. In Chanvalon's account of Martinico, it is proposed, as a most important question in agriculture, whether it is better that oxen should draw by the head or by the neck. Paris, 1761, 4^{to}.

[s] Part iii. p. 164.

[t] Ibid. p. 180.

* It was one of the articles of peace between the earl of Ormond and the Irish, that the two acts of Charles the First, prohibiting the Irish to plow with horses by the tail, and burning oats in the straw, should be immediately repealed. Milton's Pol. Works, vol. i.

made at Kilkenny, in the fortieth year of Edward the Third, whilst the duke of Clarence was Lord Deputy, to abolish the *Brehon*, and introduce the English law [*u*]; but this ordinance was certainly never carried into execution beyond the English pale, any more than another made in the tenth of Henry the Seventh, by which the use of the Irish language was forbid under penalties [*w*]. The first statute, which thoroughly established the dependence of the Irish, was the famous law of Sir Edward Poynings, who was lord-deputy of Ireland in the reign of Henry the Seventh.

If what hath been here observed wanted any additional proof, the present statute supplies it; as it consists of eight different chapters, and not one of them abolishes any of the Irish customs, or *Brehon* law; the regulations also have nothing very particular in them, and are calculated only for the English pale.

I shall therefore make no observation, except on the 5th chapter, which directs, that the fee of the marshal, or gaoler, from the prisoner, when he is set at liberty, shall not exceed 4*d*. This seems most clearly to prove the right which the gaoler hath to this demand by the common law [*x*]. As the criminal is almost always

[*u*] There is, in Riley's Pl. Parl. a writ to the Justice of Ireland, in the fifth of Edward the Third, to the same purpose, p. 586. as also another, p. 569.

[*w*] Lord Bacon, in a letter to Secretary Cecil in 1601, recommends the reforming the barbarous laws, customs, habits of apparel, as also their poets and heralds, *who enchant them in savage manners*, and sundry other such dregs of barbarism, vol. iii. p. 226. There is amongst Mr. Petyt's manuscripts, in the Library of the Inner Temple, *A Treatise of Irelande*, by Sir John Dymoke. The time of its being written is not mentioned; but I should imagine, from the character, it was in the reign of Charles the First. This treatise is very methodical and complete as far as it goes; but it seems to have been left unfinished by the death of the author.

[*x*] The fees of the gaoler of Newgate, and the turnkeys under him,

always in necessitous circumstances, the payment of this fee is often disputed, and always most justly complained of: the remedy however seems to be by settling a proper salary on the gaoler, as otherwise he is most clearly entitled to it. Many, who exclaim against the gaoler's fees as unreasonable, may not perhaps know that a secretary of state, or his officers, claims a fee of two guineas for an answer to the judges representation, that a criminal is a proper object of the king's mercy, upon condition of transportation [y].

As, in the Comment upon Magna Charta, I have mentioned the ceremonies through which a Scotch act of parliament passed, before it became a law, I shall here take notice of the forms required with regard to an Irish statute.

Sir Edward Coke [z] informs us, that the order of proceedings and summons in parliament is first, that the Lieutenant and Council do certify, under the great seal of Ireland, the causes and considerations of all such acts as seem good to them to be passed in parliament: they are then to be affirmed, altered, and returned under the great seal of England [q].

The *justice* of Ireland, mentioned in this statute, answers to the Lord Lieutenant, and was rather a military than civil officer.

were confirmed by the court of aldermen A.D. 1685, 6. as Stow, B. iii. p. 175.

[y] It must be mentioned, to the honour of those who have lately held this office, and the greater purity of the times in matters of this sort, that this fee has not within these few years been insisted upon.

[z] In his 12th Report, p. 109.

[a] See 3 and 4 Phil. and Mar. cap. iv. Irish Stat. which is entitled, An act declaring how Poyning's law shall be expounded and taken. There is a writ of Edward the Third, in the 50th year of his reign, to oblige the inhabitants of Cork, to pay the expences of John Drogh, who is stated to have been chosen by the community to attend the king's privy council in England. Petyt Mss. vol. xxviii. p. 224. I do not recollect to have ever met with any other writ or order for a similar purpose. [x]

The

The Lord Justices of Ireland at present have *Aids de Camp*, though they generally have consisted of an Archbishop, Chancellor, and Speaker of the House of Commons.

There have been learned controversies between Molyneux and others with regard to an English act of parliament's binding in Ireland, wherein Molyneux, who contends it should not, hath argued strongly from the English statutes not being supposed to extend to Ireland before Poyning's act in the reign of Henry the Seventh. There is a note on the roll of the twenty-first of Edward the First (entitled, *De Malefactoribus in Parcis*) in these words: "Et memorandum, quod istud statutum de verbo ad verbum missum fuit in Hiberniam, teste rege apud Kenynton, 14 die Augusti, anno regni sui vicésimo septimo: Et mandatum fuit Johanni Wogan, justiciario Hiberniæ, quod predictum statutum per Hiberniam, in locis quibus expedire viderit, legi, et publicè proclamari ac firmiter teneri faciat." This note most fully proves, that it was supposed the king, by his sole authority, could then introduce any English law; and will that power be lessened by the concurrence of the two houses of parliament? Prynne therefore, in the Preface to his Argument in Lord Magwire's Case; where the point disputed was, whether he could be tried by a Middlesex jury for treason committed in Ireland, makes use of the following words: "If then the king (viz. Edward the Third) and his counsel in England might thus, by their ordinance made in England without a parliament, redress such grievances and failures of justice in Ireland how much more may the king and parliament in England, &c. [b]?" The introducing the English law was so absolutely in the king's power, that a writ to the justiciary of Ireland, in the 5th of Edward the First, recites, that though the Irish customs "Deo de- testabiles existunt et omni juri dissonant adeo quod leges censerì non debeant;" yet the king, by *advice of his privy*

[b] London, 1658, 4^{to}.

council, will not send them better, unless they offer a larger sum for these alterations than they had hitherto given his majesty reason to expect [c]. There is also an order of Charles the First, in the third year of his reign, to the treasurers and chancellors of the Exchequer both of *England* and *Ireland*, by which they are directed to increase the duties upon Irish exports [d]; which shews that it was then imagined, the king could tax Ireland by his prerogative, without the intervention of parliament. What would have been the answer of the English legislature, in the year 1650, to the late claim of independency in the colonies, will appear by the preamble to an ordinance of the 3d of October of that year: "Whereas in Virginia, and the islands
 " of St. Christopher, Nevis, and Montserrat, and divers other
 " islands and places in America, *which were planted at the cost,*
 " *and settled by the people and authority, of this nation, which are*
 " *and ought to be subordinate to, and dependent upon, England, and*
 " *hath ever since the planting thereof, and ought to be subject to such*
 " *laws, orders, and regulations, as shall be made by the parliament*
 " *of England* [e]."

[c] Rymer, vol. i. part ii. p. 157. A.D. 1277.

[d] Rymer, vol. viii. part ii. p. 205.

[e] Scobell, part ii. p. 132. There is, in the fifty-first volume of Mr. Petyt's manuscripts, a commission, in the year 1634, directed to the archbishop of Canterbury, the lord chancellor, and other lords of the privy council, by which they are empowered to prepare laws for the better governing the colonies, which were afterwards to be enforced by the king's proclamation, p. 38.

THE STAT. OF WESTMINSTER THE THIRD,

Viz. QUIA EMPTORES TERRARUM,

Anno 18 Edw. I. A. D. 1290.

IT should seem, that, before this statute, no one, who held land under a superior lord by any services, could alien without his licence. As the lord probably insisted upon large fines on such permission, the freeholder holding under him, who now began to be rather more independent, used to make secret feoffments, by which the lords lost their escheats, wardships, &c. *quod durum magnatibus videbatur*, says the statute. They thought it therefore, on the whole, convenient to permit such alienation, provided the alienee held by the same services under the superior lord, by which the enfeoffor held before such transfer of property, and by this means the change of tenants became a matter of indifference: this therefore may not be improperly styled the first great Statute of *Alienation*.

It consists of three short chapters, and nothing occurs further, which it is material to observe upon, except that this statute is likewise to be found in Riley's *Placita Parliamentaria*, which begin with the eighteenth year of Edward the First; and that the style of this king is, for the first time, Edward *the Son of Henry* [*f*], which I should conceive he had assumed to distinguish him from the Edwards kings of England before the Conquest. Thus likewise Edward the Third, for a considerable

[*f*] This style is not in the original, but only in the translation. The inscription upon Queen Eleanor's tomb, in Westminster Abbey, is, "Icy
"gift Alianor, jadis reine d'Angleterre, femme al Re Edward Fitz. . .;"
after which the words are obliterated: but, undoubtedly, *de Henri* should follow.

time, styled himself *Edwardus, filius Edwardi, Edwardi filii*, but afterwards changed it to *Edwardus post Conquestum tertius*. Henry the Eighth, in the greatest plenitude of his power, thought it more prudent to have the sanction of parliament for this purpose [g]. The most complete collection of the titles used by the ancient kings which I have happened to meet with is in the Petyt Mss. [h]. Charles the First wanted to change his style in the first year of his reign, to "King of Great Britain," as well in all *legal* acts and proceedings as in acts of *state* and other *indifferent* acts; but the judges on consideration held this could not be done [i]. The kings of France did not distinguish whether they were the second, third, fourth, &c. of their names; and, by that neglect, it is very difficult to settle in what reign many of their grants were made [k].

It is very extraordinary also, that the best French antiquaries and historians have not settled when the kings of France were first styled *Most Christian*. *Mabillon* and *Henault* had fixed this so late as the year 1469, when it was conferred on Lewis the Eleventh by Paul the Second. Monsieur *Bonamy* hath however proved, that this title may be traced as far back as Pepin, the father of Charlemagne, and continued through a long succession of the French kings [l]. Henry the Seventh of England assumed this same appellation [m].

Sir Edward Coke hath, in his *First Institute* [n], given an account of the different styles used by the kings of England,

[g] See 34 and 35 Hen. VIII. cap. iii.

[h] Vol. E. p. 269, & seq.

[i] Whitelock's Annals Ms. p. 44. Penes Mr. Morton.

[k] Nouv. Traité de Dipl. t. iv. p. 530.

[l] See the History of the Academy of Inscriptions, and Belles Lettres, vol. xxix. p. 268, & seq.

[m] See Anstis's Hist. of the Garter, vol. 1. p. 244.

[n] P. 7. B.

in order to detect spurious records or deeds which may have been forged; he hath however omitted the change of style above-mentioned, both by Edward the First and Edward the Third. Lady *Ivy* was indicted for a forgery in the year 1685, which was detected by the style of Philip and Mary being improperly recited [o].

[o] State Trials, vol. vii. p. 610. There may be another method of detecting spurious instruments which are signed by the kings of England. Edward the Fourth used the form of *R. E.* or *Rex Edwardus*. Richard the Third of *R. R.* which may either stand for *Rex Ricardus*, or *Ricardus Rex*. Henry the Seventh, however, signed *H. R.* or *Henricus Rex*, which form seems to have been adhered to ever since. See Rymer during the different reigns. Before the time of Edward the Fourth, all instruments bear date *Teste Rege*, without the Royal signature, the reason for which probably might arise from the Kings of England before this either not being able to write at all, or otherwise very indifferently. The two initial letters used afterward might have possibly arisen from the same reason. Henry the Eighth, in the sixth year of his reign, seems to have begun signing *Henry R.* See Rymer, vol. vi. part. i. p. 61.—In the same year also a treaty is signed *Henry R.*

And underneath

Throc Morton.

This seems to be the first instance of a single officer signing below the king, and was probably borrowed from the French, as two or three treaties occur before, where the king of France signs in that manner.

STATUTUM DE MONETA.

20 Edw. I. Stat. iv. A. D. 1292.

I SHALL consider this statute with two other laws which passed the same year (entitled, *Statutum de Monetâ parvum et articuli de Monetâ*) as forming but one statute, though they are printed in all editions as distinct ones: in the twenty-seventh year of this king's reign, is likewise another statute to the same purport, entitled *Statutum de falsâ Monetâ*.

These are the first regulations with regard to the coin, at least by authority of parliament[o]: before this, one of the Chronicles informs us, that in the reign of King Stephen, *omnes potentes, tam Episcopi quam Comites et Barones, faciebant monetam*; but Henry the Second, on his accession to the throne, *novam fecit monetam, quæ sola recepta erat et accepta in regno*. This wise alteration made by Henry the Second[p], in bringing all the money of the kingdom to the royal mint, seems to have been acquiesced in; but, though it in some measure provided against the making of base coin at home, it could not prevent its being imported. It is very remarkable, that there does not seem to be

[o] Sir Thomas Rowe, in a very able speech made in parliament on the subject of coinage, cites this passage from the *Mirroire de Justices*, "Le roy ne veut sa money impaire ne amender, sans l'assent des tous les counties." Rushw. Coll. vol. ii. p. 1218. This speech is also printed in the fourth volume of the Harleian Miscellany. There is in the Peryt Mss. a request of Henry the Third, in the thirty-eighth year of his reign, to the king of Scotland, that he would coin money with the same degree of alloy as he had enjoined by some late regulations. Vol. ix. p. 111.

[p] Philippe le Bel was the first king of France who claimed the sole prerogative of coining money. Boulainv. vol. ii. Before this (as in England) the Great Lords coined within their own Seigneuries.

much

much apprehension of this crime being practised in England, and that the regulations of these early statutes are calculated to prevent money of bad alloy being introduced from abroad, particularly from *Avynein*, which I take to be the same with *Avignon*. Above a century before this, indeed, there had been very severe examples against persons convicted of this offence. The Chronicle of the Abbot of St. Peter de Burgo [q] says, that, in the year 1125, "Justitia de monetariis fit per Angliam, quibusdam suspensis, quibusdam dextris manibus amputatis, et aliis testiculatis, et mutilatis [r];" and Thomas Wykes [s], in his Chronicle, mentions, that, in the year 1278 (which was but fourteen years before the present statute), many Jews were punished in England for the same crime. These proper examples therefore seem to have stopped the counterfeiting money at home, upon which these statutes to prevent base coin being introduced from foreign countries became necessary. It hath already been observed, that, upon a regulation's taking place in England, it is soon adopted in France, or *vice versa*; and therefore, in the year 1306, there are French ordinances similar to the present, which were occasioned by the money in that kingdom being so debased, that there was a general insurrection of the lower artisans at Paris [t].

No mention is made of gold coin in this statute, which is generally agreed not to have been introduced till the reign of Edward the Third, and this seems to be confirmed by the silence of Records in Rymer, till the seventeenth year of that reign.

[q] Published by Sparkes in 1724.

[r] It is very remarkable, after this instance of capital punishments, that the present statute is so far from making the offence felony or treason, that it is contented, in most of the clauses, with merely *forbidding* the crime.

[s] Gale's Collection, vol. iii. p. 107. where the bad consequences attending this offence are very sensibly set forth.

[t] Chronique de France, par Maître Nicholle Giles, Paris, 1556.

Maitland however proves that gold was coined earlier [u], which I should rather suppose to be medals upon coronations or some other great solemnity, than that it was commonly circulated as money, especially as the *Dialogus de Scaccario* mentions only silver. No brass was coined till the reign of James the First, when the name of *farthing tokens* was first used [w].

Though the offence of introducing base coin is simply forbidden in most instances by these statutes of the twentieth year of Edward the First, yet in seven years afterwards, by the twenty-seventh of the same king, it is made capital; by the twenty-fifth of Edward the Third, it is declared to be high treason; and even the being detected with coining-tools or instruments, is made equally criminal by the eighth and ninth of William the Third. I do not mean to condemn these laws as severe; but there seems to be an impropriety in making a crime the same, or classing it with treason, which hath no immediate relation to it, especially as there is no very material difference to the criminal, when convicted, whether he suffers as a felon or as a traitor; and the blanching copper, in order to counterfeit silver, is only made felony by the sixth section of the same statute.

[u] Hist. of Scotland, vol. ii. p. 218. See, however, further on this head in the comment on 23 Hen. III.

[w] Clarke on Coins, p. 432.

[173]

A CONFIRMATION OF THE CHARTERS,

Made in the 25 Ed. I. [x] A. D. 1297.

THE occasion of this confirmation of Magna Charta, and the Charter of the Forests, arose from Edward's necessities, as he had previously rifled all the monasteries, as also laid a general embargo on wool and leather [y].

Though it is only entituled, *A Confirmation of the Charters*, it seems to contain additional matter, which is perhaps of more constitutional importance than all the provisions of the two Great Charters.

The first is, that no grant given by the free will of the people shall, by force of precedents, become a cause of *bondage*; and the second, that neither from archbishops, bishops, abbots, priors, counts, barons, or the *commonalty of the land*, on no pretence, shall any aid or tax be taken or levied, but by the *common assent* of the realm and for the *common profit* thereof. From this time, the commons necessarily became an important branch of the legislature [z]:

“Scilicet et rerum facta est pulcherrima Roma.”

[x] Mr. Petyt hath made this marginal observation in the first volume of his *Theatrum Criminalium*, where he gives a copy of the Statute de Tallagio non concedendo, which agrees in many parts with the present statute: “Statutum de Tallagio non concedendo imprimitur sicut
“34 Edw. I. Vid. etiam Cok. 2 Inst. p. 532. sed hallucinatur, vir honorabilis, nam statutum illud sancitum fuit anno 25 Edw. I. nisi valde fallor.” Manuscripts, in the Inner-Temple Library, vol. i. p. 16.

[y] See Camden, *Anglica Norm.* p. 65.

[z] Pasquier supposes the *menu peuple* were first permitted to have a share in the French legislature, “that they might be taxed the more severely under pretence of its being with their own consent.”

Can

Can it be imagined, that this parliament would have permitted the king to levy ship-money?

This statute consists of seven chapters; in the third the *Charters* are ordered to be read [a] in every cathedral church twice a year; they must therefore be in the archives of every ancient cathedral, if not mislaid or destroyed [b].

The 7th and last chapters mention the oppression *de la male-toute des leynes*, which is translated *maletent of wools*; it should be however *maletot*, which was a name given by the French to an ancient and oppressive tax on salt, as appears by all their old Chronicles. Boulainvilliers mentions a pun of Edward the First, with regard to this tax, who called Philippe le Bel, continuing to levy it with oppression, *son frere de la loi Salique*.

After this confirmation of the Great Charters, follows the famous sentence of excommunication by the archbishop of Canterbury, said to be taken from a very ancient manuscript. By the ecclesiastical law, three admonitions are necessary before this dreadful anathema can be passed; the archbishop, however, probably animated with particular zeal, by Edward's having rifled

[a] The most dignified clergy, and probably the most learned, belonged to the cathedrals; it is much doubted whether the parochial clergy could read at this time. It is observed, in the *Nouveau Traité de Diplomatique*, that, in all the very ancient instruments, the names even of the most dignified are signed by one and the same hand, the greater part of them being not probably capable of writing. Vol. i. p. 377.

[b] Collier, in his *Ecclesiastical History*, mentions, that the authenticity of the copies of *Magna Charta* hath by some been much suspected, vol. i. p. 429. though he at the same time vindicates them from these objections. Mr. Blackstone hath printed the Great Charta, from an original in the archives of Durham cathedral; and Tyrrell, in the Appendix to the third volume of his History, says, he had the use of an original from the archives of that of Salisbury. This was, however, not returned to the Librarian, as have been informed, from great authority, that fruitless search hath been made after it.

all the monasteries to carry on his wars [c], admonishes them *once, twice, and thrice* by the same instrument, "Pur ceo que la brefté du temps plus long delai ne fuffre;" and then whoever fhall contravene, or in any way affent to the contravening, any of thefe articles, "Escommengeons del corps notre Seigneur Jefus Chrift, et de tote la compagne de ciel, et des totes les facrements de feintz esglise defeverums. Fiat. Fiat. Amen." Fleta [d] gives a very particular account of what paffed at the time this fentence of excommunication was pronounced.

[c] See note [y], p. 173. This diftrefs of Edward's probably occafioned likewise the ftatute *De libertatibus perquirendis*, made in the twenty-feventh year of his reign.

[d] L. ii. cap. 42.

STATUTUM DE FINIBUS LEVATIS.

Anno 27 Edw. I. A.D. 1299.

THE preamble to this statute, made but two years after the confirmation of the charters, recites the great grants and supplies which Edward had received from his subjects, as the *sole* reason for having made this confirmation, “*de nostrâ propriâ voluntate;*” which seems to prove it was by no means established law at this time, that an act of parliament bound the successor, but only the king on the throne. The statute then recites Edward’s great distraction on account of his wars, and likewise his expectation of a *Nuncio* from the pope, “*ad negocia expedienda, quæ ita sunt ardua, ut non solum nos, et regnum nostrum, sed totam Christianitatem contingunt, et ad ea sanius pertractanda totum consilium nostrum habere plenariè indigemus.*” This important business to be settled with the pope, was probably the claim which he had made to a supremacy in Scotland [e]; and though such pretensions deserved rather resentment than a solemn discussion, yet Edward, at this period of his reign, was upon so bad terms both with his people and clergy, that he did not choose an open rupture with the pope.

The statute consists of four chapters, and the first states the great perjury which prevailed among jurors at this time, which offence *in a witness* was not now punishable by any act of parliament; it may be perhaps thought a reflection on the common law to assert, that this crime was totally disregarded [f]; but yet we do not hear of any such prosecution, except the attainder of a jury be considered as such. The convictions by attainder

[e] See Petyt Mss. vol. vii. p. 96. B.

[f] This offence was punished capitally by the Egyptians. See Diodorus Siculus, l. i. c. lxxvii.

however became now less frequent, and the impunity of the perjured witness perhaps proved a temptation to the juror, to take the same liberties with the oath which had been administered to him. The form at this time was [g], *So help me God and the Saints*, and I do not find that the witness was sworn upon the *Evangelists*, which perhaps might contribute to irreverence in the observation of what was thus less solemnly plighted. I have not been able to discover the precise year or reign, when the oath concluded by *So help you God*; but, from the omission of *Saints*, this probably took place soon after the Reformation [b]: I should think, that

[g] "Si Dieu m'aide et les Seintz." Stat. Exon. 14 Edw. I. In the time of Fitzherbert, the oath was, "*So help me God and his holy dome.*" Fitzherb. Surv. p. 41. ed. 1767. In the reign of the Emperor Lotharius, the form was, "Sic me adjuvet Deus, et ista sancta patrocinia." Baluz. Capit. vol. i. col. 647. In the fourth year of Henry the Third, a provision is made *pro Domina Berengar*, who is recited to have been relict and queen of Richard the First; and in order to ensure the payment of this provision, John de Russell, high steward of the household, is directed to swear *in animam regis*. Petyt Mss. vol. ii. p. 165. "Au concile tenu à Toulouse au mois de Juillet 1229, on fit serment sur l'ame de la ville d'observer les articles, &c. Les procureurs du Chapitre de St. Etienne jurerent pareillement *in animam capituli*, d'observer," &c. Nouv. Traité de Dipl. t. iv. 639. There is a very learned dissertation upon the different forms of oaths anciently used in France, by the Abbé Vertot. See Mem. de L'Acad. des Inscript. t. ii. p. 648, & seq.

[b] Hooper, bishop of Gloucester, objected, in the reign of Edward the Sixth, to the form of oath making mention of *saints*, which that king accordingly altered, in the year 1550, according to Carte, vol. iii. p. 253. The old oath at the election of an emperor was, "Ainsi Dieu me soit en aide et tous ses saints;" but at the request of the Protestant electors, it was then altered, "Ainsi Dieu me soyt en aide et son saint Evangile." Gouvernement de St. Empire, p. 83. So late as the year 1533, the conclusion to an oath to be administered in the House of Lords is, "*So help me God and All Saints.*" See the Journals of the House of Lords in that year. This agrees exactly with the form prescribed by the present statute.

no court hath power, by the common law, to vary the established form of an oath, and that it was worthy of as well as required the intervention of the legislature [i].

The 3d chapter directs, that justices of assize shall be justices of gaol-delivery, and that, *after the civil business* is finished, they are then to proceed to deliver the gaol [k]. It afterwards makes a distinction between the justices, when *laymen* and when *ecclesiasticks*; if both the justices are *laymen*, they are to continue in the county, and deliver the gaol; if one of them is an ecclesiastick, then the lay judge is to associate to himself one of the most discreet knights of the county [l].

From these regulations it appears, that, in the trial of criminals, it was necessary two judges should preside, for the greater solemnity, and that, in the trial of civil actions, or *assizes*, the judge was frequently an ecclesiastick [m]. The clergy however would not interfere with regard to criminals, this being contrary to their *canons*, which will not permit them to determine in *cases of blood* as they are called. The meaning of which

[i] I would not be understood by this to condemn the alteration, but only the method of making it.

[k] On the contrary, a proclamation of Queen Elizabeth is mentioned by Fabian Philips, (on Purveyance, p. 427.) which directs the judges to begin with the gaol-delivery, and proceed in it as far as can be conveniently done, before they begin the civil business, which is indeed the present practice.

[l] The Marca Hispanica gives an account of the lay judge and bishop's sitting together in the same court, and that the criminal was tried by the judge; but if the crime was to receive a particular punishment by any lay canon, and *that not a capital one*, the bishop pronounced the sentence, p. 314. Parisiis, 1688, Folio.

[m] It appears by Bracton, that, in the time of Henry the Third, justices were appointed for the trying of particular causes: "Sunt autem justiciarii ad quasdam assisas, duas vel tres vel plures, qui quidem perpetui non sunt, quia, expleto officio, jurisdictionem amittunt." Bract. l. iii. cap. x.

canon (I should conjecture) is, that the office of a criminal judge was anciently considered as partaking of the nature of an executioner, and therefore deemed an office of blood, which was supposed rather to detract from that reverence to the body of the clergy, which the ecclesiastical canons were intended to promote. Nothing is more ancient than the clergy's declining these trials, as Becket, who was so tenacious of their privileges (to which he sacrificed his life), expressly says, "Nec nos quenquam morti debemus opponere, cum etiam iudicio sanguinis non licet inter-esse [n]."

[n] See Fitz-Stephens, in Vita St. Thomæ Cantuariensis.

A STATUTE FOR PERSONS APPEALED,

Anno 28 Edw. I. Stat. ii. A. D. 1300.

THE appeals which this law relates to are those by *Approvers*. The prosecution of criminal offences by this sort of informer is now totally disused, though I am not aware of any statute which hath expressly abolished it. It seems to be agreed by the writers on the crown law, and particularly by Stauneforde, who published his treatise before this method of prosecution was entirely dropped, that an approver must have been an accomplice actually indicted for the offence with which he charged his associates, and that, upon his offering to become a witness, it was the duty of the coroner to take his examination: we find by this statute, that he was then to be detained in prison till the trial of his accomplices, after which (*in case they were convicted*) he might claim his pardon. It must occur to every one, that evidence thus procured was of the most suspicious nature; and the 5 Hen. IV. cap. ii. accordingly recites, that “*diverse notorious rogues, for safeguard of their lives, had become*” *provers*, to the intent, in the mean time, by brocage and great gifts, to pursue and have their pardons, and then, after their deliverance, had become more notorious felons than before.” It is then enacted, that he who solicits the pardon of such an approver shall indorse the charter with an acknowledgement that it was procured at his instance; and if the approver is afterwards guilty of a felony, the person so indorsing the pardon is to forfeit 100*l*. It was this regulation which probably occasioned the disuse of prosecuting by approvers, though the writers on the crown law are silent on this head; they were generally men of an abandoned character, and therefore it was not easy to procure a person who would be surety in such a sum, whereas before
this

this statute the pardon was granted almost of course. Every material alteration of this sort in the law deserves to be traced to its original source; and that is generally to be found in the preamble, or other part, of the ancient statutes, if they are perused with attention.

To the prosecution by approver hath succeeded the more modern practice of allowing the evidence of an accomplice, with either an actual promise of pardon from the king, or an expected one by the intercession of the prosecutor. This is preferable to the prosecuting by approver in this circumstance, that the accomplice (in the latter case at least [o]) cannot claim the pardon *as of right* upon the conviction of the criminal; besides that no execution is now ever permitted on the evidence of an accomplice only, if not corroborated by other circumstances; a merciful precaution, which we do not hear of when approvers were the witnesses. The civil law says, *Non relatione criminum, sed innocentia, reus purgetur.*

[o] There seems, however, to be some objection to the form in which the secretary of state commonly promises the pardon to the accomplice, viz. upon the criminal's being apprehended and *convicted*. The testimony of such a witness would be less liable to exception, if the pardon was granted upon his giving evidence generally, let the event of the trial be what it may.

The rewards often promised for a discovery (though proceeding from a laudable zeal in those who offer them) seem sometimes to be so large that they may be supposed to bias the witness in his testimony. For example, 1000*l.* was promised in the Gazette of the 27th of July, 1767, to discover the authors of a threatening letter sent to the Scotch judges after their decision in the great cause between the dukes of Douglas and Hamilton.

ARTICULI SUPER CHARTAS,

Anno 28 Edw. I. Stat. iii. A D. 1300.

IT hath before been observed, on the statute made in the twenty-fifth of Edward the First (entituled, *Confirmatio Chartarum*), that there seems to have been a doubt, whether the king on the throne was bound by the laws of his predecessor; the present preamble furnishes an instance of another as extraordinary a doubt, viz. whether, when a statute forbids any thing, and subjoins no penalty, it can be enforced. The punishment, therefore, which is declared by the first chapter, against those who may break through any of the articles of the charters, is fine and imprisonment, according to the circumstances of the case; and this sentence the superior criminal court had most undoubtedly a right to inflict before this statute was in force. This, amongst many other instances of the same sort, should make us cautious of taking it at once for granted, that what is now most clearly established and settled law might have been so understood in this country some centuries ago. Another striking instance of this is the king's power of dispensing with statutes by a *non obstante*; a power which he seems most undoubtedly to have repeatedly exercised, but which at present seems to shock almost common sense upon the mention of it, and which we may flatter ourselves therefore can never be revived. The same observation may be made with regard to the prerogative of creating *boroughs*, with the franchise of sending members to parliament [p].

The

[p] Thus Whitelock (in his Commentary on the writ for choosing members of parliament) asserts, that "doubtless the king may grant to as many places as he pleases the privilege of sending members to parliament,"

The 2d chapter of this law is levelled against the extortions of purveyors. The establishment of these officers formerly in England, as also in other parts of Europe, arose from the same cause, the want of regular and well-supplied markets; their oppressions, however, have every where [q] either abolished the office, or laid them under severe penalties, if they abuse it. Eadmerus informs us, that, in the time of Henry the First, the peasants and farmers, when they heard of the king's approach, deserted their houses. Ascham also complains, in a letter to the then chancellor, of a most wanton instance of oppression in the king's purveyors of fish. The president of Peter-house in the University of Cambridge had a favourite pad, which he used for the recovery

"ment," vol. i. p. 501. Mr. Locke (in his Treatise on Civil Government) supposes likewise this prerogative to have existed at the time he writes, and gives the following reason for it: "Whatsoever shall be manifestly done for the good of the people, and establishing the government upon its true and just foundations, is and always will be just prerogative. The power of erecting new corporations, and therewith *new representatives*, carries with it a supposition, that in time the measures of representation may vary, and those places have a just right to be represented, which before had none." Works, vol. ii. p. 213. ed. 1759.

[q] Lady Mary Wortley Montague takes notice, that in Turkey, when the purveyors have rifled every thing from the house, they then make the owner pay a second tax for the detriment which the officers teeth may have been supposed to suffer, by the eating of what they have before injuriously extorted, and this is called *Tooth-money*. There is a very spirited speech of Lord Bacon's against the abuses of these officers, in which (amongst other particulars) he mentions, that, after the purveyor had agreed to give a price for the goods which he wanted, he then insisted upon a deduction of so much in the pound, before he would pay the king's debts, vol. ii. p. 150. Sir Edward Coke, in his 12th Rep. supposes, the prerogative of purveyance for the king's household so essentially necessary and inherent, that, he says, "an act of parliament to take it away is void." 12th Rep. p. 19. This seems to be one of the most exceptionable passages in these last collections of his Reports, which are well known

very of his health; and no other horse would satisfy the purveyor, though many others were grazing in the same field [*r*].

The Britons were oppressed with purveyance, while the Romans continued in this island: "Quæ in quæstum reperta, ipso tributo
"gravius tolerabantur. Namque per ludibrium, assidere clausis
"horreis, et emere ultro frumenta, ac vendere cgebantur [*s*]."

Fabian Phillips is the only advocate that these officers have ever had, and in his time the rigour of exacting purveyance was much abated, as the kings of England were either resident at Westminster, or did not move far from it; besides, that most of the counties contributed a regular and not very considerable tax, to be excused the payment [*t*]. It was in the royal progresses that this odious right was most severely felt; and it appears from Rymer's collection of Records, that there are hardly two, following each other, which bear date from the same place [*u*]. Machiavel [*w*] says, that the ancient establishment in France, known not to be of equal authority with those which precede. The common purveyance, in the reign of Edward the Third, was for the king, queen, and the king's eldest son. See the Rolls of Parliament, 36 Edw. III. vol. ii. p. 269.

[*r*] Rog. Ascham, Epist. Oxon. 1703. p. 321.

[*s*] Tacitus, in Vita Agricolaë.

[*t*] The proportion which each county paid may be seen in Phillips's Treatise, as well as many other curious particulars: the receiving of purveyance in kind occasioned the magnificent kitchen-establishment of the ancient kings of England.

[*u*] It appears, by Harrison's description of Britaine, that whenever Queen Elizabeth moved from one palace to another, 400 waggons were taken up by the purveyors, ch. viii. p. 109. The uncertainty of the place also where a parliament would be held made it reasonable anciently that the members of the House of Commons should be allowed what were called parliamentary wages. If, for example, a parliament was now held at Carlisle (as in the time of Edward the Second), the expence of the journey and return would be considerable.

[*w*] In his state of the kingdom of France.

during

during a royal journey or progress, was a *sous* per day for a bed, and two *sous* for linen and vinegar. I do not find that any such regulation, or fixed allowance, was settled in England; but the present and other statutes direct, that the purveyors shall give a fair price; if it is said, such a price being paid, there is no great inconvenience or oppression, yet it must be admitted, that there is a mortification in obliging any one to part with what perhaps he sets a false and only imaginary value upon.

By the 8th chapter of this *capitulary*, the king grants the election of sheriff [x] (where it is not an office in fee) to each particular county, *if they list*, as the statute says. Many statutes, previous to the present, take notice of the great oppression of sheriffs; one reason of this was, that, this officer formerly farmed the king's revenue, and therefore, like other farmers of taxes, was not only to supply the king's, but his own wants. He sometimes only collected the rents, and sometimes had the charge likewise of stocking and taking care of the crown-lands, instances of all which may be found in Madox's History of the Exchequer. The abuse most exclaimed against at this time [y] was the harassing jurors unnecessarily, by summoning them from a great distance, and likewise returning those who would not give a fair verdict between the parties; an abuse never thoroughly removed till the late act for balloting.

The 11th chapter forbids maintenance and champerty [z], which is frequently provided against by subsequent statutes: this offence

[x] It appears from the Parl. Hist. vol. i. p. 118. that, in the reign of Edward the First, it was attempted not only to establish the election of the sheriff in the people, but likewise the treasurer, chancellor, and chief justice.

[y] Ch. ix The 13th chapter likewise mentions their lodging with great trains at houses.

[z] By the 31 Edw. I. Stat. iii. the punishment for champerty is no less than three years imprisonment. It was therefore a growing evil.

B b

therefore

therefore must have been commonly practised, though we never hear of such a prosecution at present. The reason of this seems to have been, that, when a man of power formerly supported a lawsuit, the judges were influenced in their determinations, as they are now in every part of Europe, except in this happy and free country. Instances of the great corruption in judges at this time may be found in the Parliamentary History [a], which cites Hollinshead for an account of every judge in the superior courts (except John de Mekingham and Elias de Bekingham) being most severely fined to the amount of 10,000 marks.

The laws against champerty and maintenance are not confined to England; it is made criminal in Scotland by many of those ancient statutes, which are collected under the title of *Black Acts*, from their being printed in the *Old Black Letter*.

The 16th chapter directs, that the regulations of the second statute of Westminster, with regard to false returns made by bailiffs, shall be put in execution, and enforced by the same penalties, without adding any thing further; which shews, that even recent statutes were disobeyed, and wanted perpetually a new promulgation. The 17th chapter therefore orders the statute of Winton to be read four times every year in each county; and the Charters, instead of being read in every cathedral as by the former act of the twenty-fifth of Edward the First, are now to be read four times a year by the sheriff.

There are some mistakes in the translation of this statute: in the 5th chapter, which in reality is a continuation of the 4th, and governed in its construction by it, *d'autre part, le roi veut que sa chancellerie*, should be rendered, *on the other hand*, and not on *the other party*.

In the 7th chapter, *le conestable du chatel de Doevere* [b] *ne plede desormes à la porte du chastel* should be translated, *at the castle-gate*,

[a] Vol. i.

[b] The charters of the Cinque Ports were published by Jeake in 1727:

gate, and not *within* the castle-gate. The gates of towns have in many countries been made use of for the purpose of administering justice. Thus in the Psalms, *They shall not be afraid to speak with their enemies in the gate*; meaning they need not fear the prosecution of their enemy [c]. Lord Bacon hath from this observed, that the courts of justice amongst the Jews were open.

In the 18th chapter, the word *vivers* is translated a *warren*, and not a *pond*, as I have before contended in the comment on the Statute of Merton. The best expositor of the meaning of any writer is another part of his works; and the successive legislatures must be considered as constituting one author.

1727: it appears, by records there cited, that the Cinque Ports (about this time) had many disputes with regard to their jurisdiction, and particularly with the port of Yarmouth: their consequence probably arose from their situation, calculated either to invade or resist an invasion.

[c] "Her Husband is known in the *gates*, when he sitteth amongst the "elders of the land." Prov. xxxi. 23. "Allons voir les *plex de la Porte* "que on appelle maintenant les Requestes." Vie de St. Louis, p. 13. Paris, 1761. Hence also the *porte* at Constantinople is synonymous with the palace of the Grand Signor.

ORDINATIO FORESTÆ,

Anno 34 Edw. I. Stat. v. A. D. 1306.

EDWARD was now sixty-eight years of age, and consequently from infirmities no longer able to follow his favourite amusement of hunting, which Thomas de Walsingham informs us he was immoderately fond of. The offences of destroying the game, which formerly excited his warmest resentment, appeared now but venial faults; he therefore very willingly acquiesced in the mitigation of the Forest laws, and the punishment of those officers who had been guilty of unnecessary rigour and extortions. The preamble to this statute seems to have been drawn by his confessor [d], attending him in a fit of illness: “Dum imbecillitatis humanæ conspicimus in imperfectum [e], ac onera longè lateque diffusa humeris nostris incumbentia attentâ consideratione pensamus, intus nimirum diversis puncturis cordis torquemur, diversorum cogitatum fluctibus agitati, et vexamur frequenter noctes ducendo insomnes, quid agendum, quid tenendum, quidve exequendum existat, inter præcordia hæsitantes; in eo tamen, qui supra cuncta tenens in excelsis imperium, qui dat esse rebus, et dispensat prout vult munera gratiarum (cum sapientiæ suæ magnitudinem hu-

[d] In the year 1301, which was only five years before this statute passed, Edward had applied to the pope for liberty to choose his confessor, which the pontiff most graciously grants. See Rymer, vol. i. part iv. p. 8. Collier, in his Eccl. Hist. mentions the pope's having absolved this king the preceding year from adhering to the provisions of Magna Charta, *since he swore at his coronation to maintain the rights of his crown.* Vol. i. p. 499.

[e] This should be *imperfectiorem*. The word *imperfectum* is however afterwards repeated.

“mani non capiunt intellectus) virtutes resumimus, sperantes
 “quod in serviciis suis perficiat actus nostros, et suæ bonitatis
 “clementia nostram misericordiam videat, et suppleat imper-
 “fectum, ut ipsius fulti præsidio per viam mandatorum Domini
 “dirigamur.” The whole indeed of the preamble is infinitely
 more florid than any other to be found in the Statute-book;
 and, if I may be indulged in the conjecture of its being drawn by
 Edward’s confessor, I should further suppose that this confessor
 was an Italian [f].

The regulations of the statute contain nothing that requires
 either illustration or observation.

[f] Many of the early instruments in Rymer are in a florid style:
 most of them however are letters from the pope, to which I must also add
 letters from Eleonora, mother of Richard the First, during his captivity in
 Germany. It appears, indeed, that some of these were written by Peter
 of Blois, not only by his own works, but also by Rymer, vol. i. part i.
 p. 25.

STATUTUM DE APPORTIS RELIGIOSORUM,

35 Edw. I. A. D. 1307.

THOUGH the title of this statute is *De apportis* [g] *religiosorum* in general, yet from every regulation it seems to have been chiefly levelled at aliens possessed of priories and abbeys, who resided in other countries. The pope at this time had the power of conferring many of these ecclesiastical preferments, which he generally gave to Italians; the religious houses however, under no kind of controul from their superior, who lived in another country, not only slighted his visitatorial injunctions, with regard to their own discipline, but likewise withheld the superior's rights and dues, especially as most rents were at this time paid in kind, which were no advantage to an absentee, who could not consume them. The superiors therefore, backed by the papal authority, had changed their share of the rents in kind to a composition in money, which the religious houses did not choose to pay, and had the very good pretence (with the legislature of England) to say, that this backwardness arose from their being unwilling to send any money out of the kingdom. The statute therefore directs, that they shall not for the future transmit any thing whatsoever to their superiors beyond sea, under whatever name it might be claimed. It being likewise found that the superiors had made exchanges to the prejudice of the religious houses, in consideration of money paid to themselves, the statute very properly enacts, that every religious house should have a common seal, which should be in the custody of not only the abbot (as before), but joins four others *de dignioribus et discretiori-*

[g] Du Cange, in his Glossary, explains the word *apportum* (which is sometimes written *asportatum*) to signify *quicquid apportatur ad sustentationem illius, qui ecclesiæ curam habet.*

bus;

bus; and every grant or exchange, to which this common seal should not be affixed, was for the future to be void. It then concludes by declaring, that it is not intended to take away any part of the superior's visitatorial power, provided he will come into England in order to exercise it, and that he shall likewise be allowed his reasonable expences for the journey.

The last statute of this reign, entitled, *Ne Rector arbores in cœmeterio prosternat*, is a very short one, but deserves to be taken notice of from the preamble's stating, that trees in a church-yard were often planted to skreen the church from the wind: how as churches were built at this time, the thick foliage of the yew answered this purpose better than any other tree. I have been informed accordingly, that the yew-trees in the church-yard of *Gyffin*, near Conway, having been lately felled, the roof of the church hath suffered excessively.

Edward the First reigned thirty-four years, during which he summoned nine parliaments. He hath been styled, by Lord Coke, the *English Justinian*; and as he came to the throne at the age of thirty-four, and had no rebellion of consequence, but, on the contrary, added Wales and Scotland to the English dominions, he had leisure, during this uninterrupted course of prosperity, to reform the law. The statutes of *Westminster the First* and *Westminster the Second*, together with the statute of *Wynton*, are proofs of his attention to this most important branch of the duties of a king; and he particularly assumes (with reason) to himself the merit of preventing unnecessary delays by the preamble to the statute *De conjunctim feoffatis* [b], "*Non est novum, quod nos inter cæteras legum editiones, quas temporibus nostris adinvenimus, celerius apponi decrevimus remedium.*" The Statute of *Quo Warranto*, on the other hand, must not here pass unnoted, and will for ever affect his character as a legislator.

[b] Made in the thirty-fourth year of his reign.

STATUTUM DE MILITIBUS,

1 Edw. II. A. D. 1307.

THERE are but two statutes of this first year of the reign of Edward the Second, the latter of which declares, that it shall not be felony [*i*] to break prison, unless the crime for which the criminal is committed was a capital offence, which is recited by the statute to have been *otherwise by the common law*, and was therefore a very proper alteration of its severity. As Edward is said, by all Historians and Chroniclers, to have been entirely guided by his favourite Piers Gaveston, I should imagine that this general regulation was covertly [*k*] meant for his protection. In the early part of this very year, Edward the First had ordered him to quit the realm, previous to which he had probably been committed, and escaped from his confinement: no capital offence had, however, been laid to his charge; and therefore if the favourite, whom Edward was now determined to recall, had been prosecuted for breach of prison, this statute became a defence against the more severe penalties of such a prosecution. It appears by Rymer, that Edward had not succeeded to the throne a full month, before he made a most profuse grant to Gaveston, which possibly from its extravagance occasioned the only other statute of the present year, entitled, *De Militibus*, which directs, that every one who was of the age of twenty-one, and who had 40*l.* a year in land, should be compelled

[*i*] The *Mirror of Justices*, which is supposed to have been written in this reign, inveighs strongly against making any breach of prison amount to a felony, p. 283.

[*k*] In the seventh year of this king's reign, there is an express statute, *Ne quis occasionetur pro reditu Petri de Gaveston*.

to take upon himself the order of knighthood. This regulation, which was now converted into a tax, must have originally been established, that the king might know those of his subjects who had considerable estates (for such 40*l.* a year at this time was), and that, upon their becoming knights, he might receive their fealty. It was necessary, however, that the person who was required to receive this dignity [1] should, from his bodily strength, be able to serve the king in his wars; and therefore it appears by this statute, that old age, incurable distempers, and other excuses, were allowed: the law however directs those,

[1] The *Marca Hispanica* mentions two kinds of milites, or knights, viz. those who received this honour from the sovereign, and likewise others who were obliged to provide *equos cataphraticos*, or a large war-horse: it might not be unreasonable therefore to pay a considerable composition, to get rid of so burthensome and expensive a tenure. *Marca Hispanica*, p. 260. Another reason for paying the fine, upon becoming a knight, anciently arose from those who were candidates for this honour being previously subject in the houses of Great Barons (who had power, as well as the king, in certain districts, to make knights) to many low and menial services, *as making the beds, and serving at table*; and from which they were exempted as soon as they became knights. See St^e Palaye's *Dissertations on the ancient Chivalry*. It appears by Mons^r. Houard's late translation of Littleton into modern French, to which he hath subjoined a learned comment, that no one but a knight could sit at a baron's table. Tom. i. p. 129. *Favin* also mentions that even the *Damoisceaux*, who were the sons of *princes*, or *great lords*, could not sit at the same table with their father till they had received the honour of knighthood, p. 577. Edward the Third made frequent use of this compulsion to procure money, of which he seems to have been almost perpetually rapacious. In the twenty-first year of his reign, he grants a pardon to Ralph Shelton for having neglected to become a knight before the battle of Crecy, after which he became a knight-baneret. See Rymer, vol. iii. part i. p. 10. In the fortieth year of his reign, he again had recourse to the same method of raising money from his subjects. Ibid. part i. p. 108. Charles the First, in his distresses, insisted upon a composition of 40*l.* from those who declined being knights. See Anthony Wood's *Life*, p. 19.

who for such reason declined this honour, to repair without delay to Robert de Tiptot and Antony de Beke [m], who, upon their paying a proper composition, were to give them a discharge. These compositions probably produced as great complaint as those which were made in the time of Henry the Seventh against Empson and Dudley, and, though this hath escaped the historians, might have contributed to the troubles and distresses of Edward which afterwards ensued.

[m] There is a record in Rymer, dated the 4th of September at Carlisle, which is entitled, *Pro Antonio Beke, de libertate Ecclesie Dunelmensi restituta*; from which it appears, that this Antony de Beke was bishop of Durham, and that his temporalities were seized by Edward the First. Leland says, that Anthony Beke was chosen patriarch of Jerusalem in the year 1305, that he built the castle at Awkland, as also at Eltham, and from his magnificence was much detested by the nobility. He died in 1310.

De

DE DIVERSIS LIBERTATIBUS CLERO CONCESSIS,

9 Edw. II. A. D. 1315.

WE have no statutes from the second year of Edward the Second, till the present *capitulary*, though, if we may credit Thomas de Walsingham [n], many parliamentary regulations were made in some of the preceding years with regard to the price of meat. His words are these: "Anno Domini 1315, velut Deo displicerent *Statuta præcedentis Parliamenti* (sc. de Carne &c.) omnia solito cariora fuerunt:" and therefore he informs us, that the present parliament, though this statute is likewise lost, or at least is not printed, applied the only wise remedy to such an increase of price, by enacting, that every one, *viſtualia ſua meliori, pro quo poſſet, venderet ad libitum*.

The present statute consists of sixteen chapters, all of which relate to privileges and immunities claimed by the clergy, which Edward, in his present situation, could not refuse; though in the earlier part of his reign he was upon so bad terms with this body of men, that the archbishop of Canterbury had excommunicated [o] all those who might contribute to the return of Piers Gaveston. The different parts of the statute seem to contain nothing very particularly deserving notice. I shall therefore only mention, that Prynne [p] seems to have irrefragably proved, in opposition to Sir Edward Coke, that this is no act of parliament; and, amongst other authorities, by a case in the Year Book of Edward the Third, where one of the judges expressly denies its being a statute.

[n] Thomas de Walsingham, p. 107. In further proof of this, there are summonses to parliament in Dugdale for every intermediate year. There are indeed two statutes, of the seventh year of this king, which relate merely to Peter de Gaveston.

[o] Parl. Hist. vol. i.

[p] Records, vol. iii. p. 336, & seq.

THE STATUTE OF YORK,

12 Edw. II. A. D. 1318.

DUGDALE furnishes us with the summons to this parliament, which informs us likewise at what time of the year it was held.

“ Rex venerabili in Christo Patri eadem gratiâ Archiepiscopo
 “ Cantuariensi salut. Quia super diversis et arduis negotiis nos
 “ et regnum nostrum tangentibus parliamentum nostrum apud
 “ Eboracum a die S. Michaelis in tres septimanas tenere, &c.
 “ Teste rege apud Nottyngham 25 die Augusti.”

The five first chapters relate to the amendment of the law, as the preamble recites that many of the ancient statutes wanted *explanation*; and the 3d chapter mentions particularly a statute of the twenty-seventh of Edward the First, which was *not sufficiently clear*. I take notice of this, to shew, that the complaint of obscurity in the statute-law is by no means to be confined, as it generally is from the common prejudice in favour of antiquity, to modern acts of parliament. It may, on the other hand, with justice be asserted, that modern statutes are infinitely more perspicuous and intelligible than the ancient ones, of which there cannot be a stronger proof than that there is not perhaps a single act of parliament, since the statute of Frauds and Perjuries and the statute of Distributions in the reign of Charles the Second, which hath required much explanation [q]. It was indeed pro-

[q] There is a common notion in Westminster-Hall, that the statute of Frauds hath not been explained at a less expence than 100,000*l*. It is great injustice to the memory of Lord Chief Justice Hale, to say he was the person who drew it.

phesied

phesied by many, that the bill for the alteration of the style [r] would occasion an infinite number of law-suits: but no question arising upon the construction of this law hath ever been argued in any of the superior courts. The true objection to modern statutes is rather their prolixity, than their want of perspicuity; which redundancy hath in a great measure arisen from the use of printing: when manuscript copies are to be dispersed, the trouble of writing an unnecessary word is considered, but a page or two additional in print neither adds much to trouble or expence[s]. I would not hence be misunderstood to be an advocate for prolixity: the English statutes have this fault perhaps in common with other laws. The oldest conveyance we have any account of, viz. that of the cave of *Machpelah*, from the

[r] In the year 1516, the pope sends a letter to Henry the Eighth, "Super anticipatione æquinoctiorum, de Kalendario emendando." See Rymer, vol. vi. part i. p. 119. It appears, by the Philosophical Transactions, that the alteration of the style was proposed so early as the year 1582 by Lord Burleigh, who employed the famous mathematician John Dee on that occasion; it was afterwards resumed, in 1700, by Dr. Wallis. See also Harrison's topographical description of Britain, prefixed to the first volume of Hollinsh. Chron. p. 244. It was one of the articles of a treaty between the Romans and Persians, in the time of Justinian, that it was to last for 50 years, and the year to be computed, το αρχαιον εθ^{ος} τε ενιαυτη αριθμενη, and ending on the 365th day. Embassy of Menander. Byzantine Historians, vol. i. p. 95. Venice, 1729. Before the alteration of the Calendar by Julius Cæsar, Cicero is eternally asking Atticus, in his letters, when the intercalation is to take place.

[s] "From the reign of Robert the First, words began to be multiplied; before the reign of James the Third, the evil had increased: it is now familiar. How the chimes are rung in our enlightened age upon any horse, mule, ass, cattle, coach, berlin, landau, chariot, chaise, calash, waggon, wain, cart, or other carriage whatsoever, as if every quadruped and carriage would not comprehend all particulars." Historical Memorials, concerning the Provincial Councils of the Scottish Clergy, by Sir David Dalrymple, p. 26. Edinburgh, 1769, 4^{to}.

sons of *Heth* to *Abraham*, hath some unnecessary and redundant words; *And the field of Ephron, which was in Machpelah, which was before Mamre, the field and the cave which was therein, and all the trees that were in the field, that were in all the borders round about, were made sure unto Abraham, &c.* Genesis xxiii. The parcels, in a modern conveyance of 1768, cannot be well more minutely particularized. *Le Moine*, in the preface to his *Diplomatique Pratique*, printed at Metz in 1765, complains that prolixity in the French law, and conveyances, took place first in this century, “ lorsque les styles eternels du 14^{me} siecle prirent la place de cet admirable Laconisme, qui caracterisoit le siecle precedent.”

There are but two things in the five first chapters which seem to require any particular notice; the first is, that, though we have before heard of *attorneys*, a *bailiff* was to all intents and purposes considered as an *attorney*, and might appear for his principal. The second is, that the witnesses to a deed seem to have been anciently a necessary part of the jury, which was to try the validity of such an instrument, but, as the party who had reason to decline the trial used probably to procure the absence of these witnesses, the statute therefore directs, that, if they do not appear, upon proof of their having been properly summoned, the jury may proceed without them [1].

There is at the end of these regulations, for the amendment of the law, a chapter of a very miscellaneous nature, which, amongst other things, is intended to prevent any officer of a city or borough, who from his office is to regulate the assise of victuals or wine, from dealing in either of these articles (whilst he continues in office), under penalties to be recovered by informa-

[1] The necessity of these witnesses being formerly part of the jury hath possibly occasioned a very troublesome and unnecessary ceremony in the attestation of deeds by *two witnesses*; this is often attended with great inconvenience,

tion,

tion, a third part of which is given to the informer. This seems to be a very proper regulation to prevent what is now called a *job*; but from the statute's being so ancient, and the regulation being inserted in a law, the greatest part of which relates to matter entirely different, I should much suspect that most officers in corporations are ignorant of the penalties which they subject themselves to by the infringement of this statute.

THE

THE STATUTE OF ESSOYNS,

12 Edw. II. Stat. ii. A. D. 1318.

THIS statute declares by negatives what essoyns *shall not be allowed*, which kind of excuse on the part of a defendant, being productive of unnecessary delays, is restrained by many acts of parliament, and the more modern ones generally take it entirely away. Amongst other negative instances it is declared, that it shall not be allowed “*de foeminâ in servitio domini regis, nisi quia nutrix, aut obstetrix, aut mittatur per breve ad ventrem inspiciendum,*” which words of the statute have been the occasion of a most extraordinary mistake of Sir Edward Coke, in his first Institute^[u]. He is there treating of protections, which are generally used for the same purpose as essoyns, merely for delay, consequently are often considered together, and are equally discountenanced by the statute-law^[w]. Having entered in his common-place this part of the statute (essoyns and protections making one title or head), he says, that “Protections may be allowed not only to men of age, but likewise within age, and to women, *quia nutrix aut obstetrix*, as necessary attendants upon a camp;” and this most extraordinary position is supported by a marginal reference, in which a record is cited no further explained than by these words, viz. *For the*

[u] First Institute, p. 130. A.

[w] The common clause in all modern acts of parliament is, “No *Essoyn, Protection, or Wager of law, shall be allowed.*” Esoyns amongst the French are, *illness, and the necessity of assisting a father, son, brother, or nephew*, when they are in danger of death. Houard’s Littleton, t. i. 498. In the bad state of the roads of this country, anciently, some essoyns had however a reasonable foundation, which seldom are real excuses at present, as the *way being unpassable, the want of a bridge, &c.*

Countess of Warwick. Now a nurse, or Midwife, might be wanted for the Countess of *Warwick*; though how they could be considered as *necessary attendants upon a camp* is not easily to be conceived, except it was for an army of *Amazons*; who, during the season for a campaign, contrived (according to tradition at least) not to require the assistance of a midwife [x]. I think it is not difficult to suggest the occasion of a protection, which might be indorsed *pro Comitissa Warwic.* A countess of *Warwick* was wife of an earl of that name, who went on some embassy [y]: she was near the time of her delivery, and, like all other women in that very critical situation, chose rather to have her own nurse and midwife about her than to trust to strangers in a foreign country. She therefore solicited a protection *quia profectura*, and included in her suite the *nutrix* and *obstetrix*: the protection was therefore properly indorsed *pro Comitissa Warwic.* It may perhaps be thought that I have dwelt too long upon this mistake of Sir Edward Coke; but the errors of so great a man require most particular notice, as they otherwise pass as law under the sanction of such an authority, and the more so, as Sir Robert Filmer argues from what this consummate lawyer hath advanced in his first Institute on this head [z].

[x] The Emperor *Alexius* indeed made an extraordinary regulation in favour of the sutlers wives who may be in labour during the march of the army, which upon a particular sound of the trumpet was obliged to halt, till another signified the woman's happy delivery. See Anna Comnena, inter Script. Byz. l. xiii. p. 304.

[y] It appears by Dugdale's account of *Warwickshire*, that an earl of *Warwick*, with his Countess, went on an embassy to France in the seventh year of Henry the Fifth.

[z] See the *Freeholder's Grand Inquest*, p. 69.

STATUTUM DE PRAEROGATIVA REGIS,

17 Edw. II. A. D. 1324.

THE branches of the king's prerogative, which are declared by this statute, almost entirely relate to Wardships and Feudal Tenures. As no part, except the 12th chapter, requires any particular explanation or comment [a], I shall first mention, as the title of the statute leads to it, the following fundamental maxims of the French law, upon which the king's prerogative [b] is founded, which may not only be matter of some curiosity to an Englishman, but by comparison may make him thankful for the noble constitution to which he is happily born. A *Cappadocian* may indeed refuse, from custom and long usage, to exchange a despotic for a more free government [c]; but I can never be persuaded but that there is a necessary connexion

[a] It is hardly necessary to mention, that Staunford, the author of the Treatise on the Pleas of the Crown, hath written a comment on this statute.

[b] Mr. Locke defines prerogative to be "the power of doing public good without a rule." Unfortunately, however, it is not easy to settle *what is for the public good*, when these rights of the crown are disputed.

[c] Lucan seems to be the only writer who hath considered the Cappadocians in any other light but a most effeminate and luxurious people:

" — venere feroces

" *Cappadoces* —"

to make part of Pompey's army. Lucan, l. iii.

Festus Avienus also represents them as active and alert:

" *Mediis hic impigra in acris*

" *Cappadocum gens est propter freta turgida.*"

Orbis Terræ Descriptio, l. 1151.

between

between freedom and happiness. Seneca nobly inforces the communication of liberty to the subject, from the safety it procures to the king: "Errat si quis existimat tutum esse ibi regem, ubi nihil a rege tutum est; securitas securitate mutuâ perciscenda est." I do not mean however to condemn all the prerogatives given to the king by the French law, as some of them are equally vested in the crown by the law of England, and for the most salutary purposes to the subject:

"Le roy ne tient que de Dieu, et son espée.

"Si veut le roy, si veut la loi.

"Toutes les personnes de son royaume lui son sujettes.

"Au roy seul appartient de lever les tributs, de faire la guerre et la paix.

"Le roy est le principe et le terme des toutes les justices.

"Le roy seul peut accorder graces et remissions [*d*]."

I have before said that the 12th chapter requires a comment; it is thus worded: "Item habet rex escaetas de terris Normanorum, de cujuscunque feodi fuerunt, salvo servitio quod pertinet ad capitales dominos feodi illius, et hoc similiter intelligendum est si aliqua hæreditas descendat alicui nato in partibus transmarinis, cujus antecessores fuerint ad fidem regis Franciæ, ut tempore regis Johannis, et non ad fidem regis Angliæ," &c. Prynne cites a passage from Matthew Paris, which throws great light upon this chapter of the law [*e*].

[*d*] Duck likewise, in his excellent treatise *De autoritate juris civilis*, informs us how far the intervention of the French parliaments is necessary in giving the full authority to the king's *arrets* or edicts:

"Rex Galliæ edictis suis semper subjungit, *Tel est notre plaisir*; sola verò in iis approbatio et consensus requiritur parliamentorum, ne quid contra utilitatem regni fit, aut jus tertii lædat."

[*e*] See Prynne's Records, vol. ii. p. 631. and also Lord Bacon's Works, vol. ii. p. 536.

The 11th chapter declares the king's prerogative in claiming wreck at sea, and also whales [*f*] or sturgeons, as royal fish: ancient records however distribute them in a more particular manner, by giving the head to the king, and the tail to the queen [*g*]. Diodorus Siculus mentions, that the queens of Egypt were entitled to the fish caught in the lake Moeris,

[*f*] There is a record in Rymer of the first year of Edward the Third, in which he claims this same right in the Province of Gascony: amber and lime-stones, thrown up by the Baltick, are enumerated as *Jura Regalia*, by the king of Prussia, in his *Code Frederique*. In a natural history of amber, published in 1699, and written by a Prussian, one of the chapters is, *De lucro fisci ex rudi succino*. Fynes Morryson also mentions, that amber lies on the sea-coast near *Koningsbergh* as safe as if it was in warehouses, it being death to take away any part of it, as it belongs to the duke of *Prussen*. Part iii. p. 81.

See also Mr. Locke's laws for Carolina, who disposes of the amber found on that coast to the eight proprietors.

Hector Boethius asserts, that large quantities of amber are found on the rocks of the Schetland Islands, cap. xii. and Mr. Pennant informs us, that the tide frequently washes it out from the cliffs on the coast of *Holderness*. Tour in Scotland, p. 13.

[*g*] *Honor de Richmond*, p. 91. The 17 Edw. III. cap. vi. barely mentions *le oor la Reine*, or, as it is most commonly, called *Aurum Reginae*. Prynne hath written an express treatise in Quarto on this tax: it is not extraordinary that it should produce nothing, as it was the tenth part of what was voluntarily paid into the Exchequer. There is an instrument in Rymer of 8 Rich. II. *De auro Reginae in Hibernia colligendo*, which proves that this was an ancient right, which took place not only in England, but in any newly-acquired dominions.

Mr. Petyt hath made a Glossary to explain some of the terms in some very ancient cases which he had collected, and hath left by his will to the Library of the Inner Temple. I find in this Glossary mention of the *Argentum Dei*, which I do not recollect to have met with elsewhere; he renders it *God's Penny* or *Earnest*. Petyt Mss. vol. vi. Some of these cases are in the time of King John and Edward I. whereas the Year books do not begin till the reign of Edward the Second.

which

which were supposed to sell annually for such a sum as to furnish her dress. The queen of Denmark is entitled to a seemingly more suitable right from what are esteemed royal fisheries, as she may claim the best pearls found in the muscle described by Lister, as "omnium crassissima et ponderosissima testa [b]." These Northern pearls are not indeed to be compared to those of the South; but I have myself seen one which was just taken out of the river Dochert, in the Highlands of Scotland, which the fishermen expected half a guinea for; nor had they any which they would part with under six-pence. The Statute-book is entirely silent with regard to the rights of a queen of England [i]; on the contrary, she is most anxiously provided for by the laws of Hoel Dda, and one of the highest penalties in the whole code is for killing her cat. There is a very ancient tax in France for providing the queen with pins [k]; from whence the term of *Pin-money* hath been undoubtedly applied by us to that provision for married women, with which the husband is not to interfere.

[b] Pontoppidan's Nat. History of Norway, p. 165.

[i] By the will of Alianor, widow of Henry the Third, her successors, queens of England, are to present to St. Catharine's Church near the Tower. Newcourt's Repertory, vol. i. p. 381.

[k] "Quand nous donons argent a quelque chambriere nous disons *"pour ses epingles."* Bellon's Voyages, p. 199. B. Paris, 1553.

MODUS FACIENDI HOMAGIUM ET FIDELITATEM,

17 Edw. II. Stat. ii. A. D. 1324.

THIS is most clearly no statute, but only an entry made in the *common-place* of some lawyer, with regard to the different method of a freeman's paying homage to his lord, and that of a villein. The form of rendering fealty agrees word for word with that in Littleton's tenures. The difference between the *freeman* and the *villein's* oath consists in this, that the freeman swears, "qu'il devindra votre homme de ceo jour en avant de vie, et de membre, et de terren honor." The villein swears, "que jeo vous ferray foial, et loial, et que jeo vous ferray justiciable du corps et de chateux."

Both the ceremonies agree in this, that the person swearing fealty is to hold his hands joined together^[1], between those of his lord; the reason of which seems to have been, that some

[1] Degrees and fellowships are conferred in this posture. Many old tomb-stones represent the hands of the dead person joined in this manner together; the conceit of which probably was, that he *was paying homage* to God: "L'ancien vassal ne doit au nouveau seigneur que la bouche, et les mains." Coutumes de Vermandois, tom. ii. p. 101. The French bishops anciently resented this form of homage, which they were to pay to the king for their bishoprick: "On les pretoit a genoux, nue tete, les mains jointes, et dans celles du Prince, et de la meme maniere, que les pretoient les vassaux de la Courone. C'est l'affujetissement à ces différentes ceremonies, qui donnoit tant d'éloignement aux eveques pour les sermens, et ils croyient que l'obligation de mettre leurs mains entre celles du Prince (comme une marque de vassalité et de dependance) bleissoit la superiorité de leur caractère." Mem. de l'Acad. des Inscript. t. ii. p. 662.

lord had been assassinated under pretence of paying homage [m]; but while the tenant's hands continue in this attitude, it was impossible for him to make such an attempt. I take the same reason to have occasioned the ceremony still adhered to by the scholars in Queen's College at Oxford, who wait upon the fellows placing their thumbs upon the table; which, as I have been informed, still continues in some part of Germany, whilst the superior drinks the health of the inferior. The suspicion that men formerly had of attempts upon their lives on such occasions is well known, from the common account with regard to the origin of pledging.

[m] The *Speculum Regale* advises the courtier, when he is the king's presence, to pull off his cloak; and one of the reasons given is, that he shews by this means that he hath no concealed weapons to make an attempt upon the king's life, p. 299—300. Those who held by knights service of the king in England were permitted to kiss his majesty; and hence a plague breaking out in the eighteenth year of Henry the Sixth, the commons petition the king by the opinion of *noble Fistsseannes* and *wise Philosophors*, that he would dispense with this ceremony. Rot. Parl. vol. v. p. 31. See the form of the Saxon and Scotch Homage, in Bishop Nicholson's Preface to Wilkins's Anglo-Saxons Laws, p. vii.

THE STATUTE FOR VIEW OF FRANK-PLEDGE,

18 Edw. II. A. D. 1325.

THIS supposed statute likewise seems to have been taken, as well as the preceding one, from the notes or common-place of some lawyer, who had occasion to hold a court of Frank-pledge, as the first period begins in the following manner: "Primes vous *nous* direz per le serement que vous *nous* avez fait, " si toutes les suitours qui deuvent suite à cest court, soient venuz " come venir deuvent, et queux ne font mie."

There are two or three things in this statute however which deserve notice. The first is the translation of the third section, which runs thus: " And if *all the dozeins* be in the assise of our " Lord the king;" which, I believe, is scarcely intelligible to the reader; the original French however explains it to mean all those who were twelve years of age, and who were obliged to appear at the leet before the statute, which dispensed with that attendance. By the 21st section, mention is made of an inquiry with regard to rapes before the coroner, which I do not recollect to have read or met with elsewhere. By the 31st section, one of the articles given in charge is, " s'il ny eit null femme putaine " *per quoi le seigneur purra perdre.*" This part of the 31st section is not translated, and I must own I do not conceive what the particular loss to the lord must have been from the harbouring such a woman within his jurisdiction. The 33d section makes mention of the punishing those who take pigeons in the winter, which proves that they never could have been considered (according to some writers on the law) as a nuisance, and that the keeping them was indictable in the leet[n]; the contrary of which

[n] In Egypt, a pigeon-house is reckoned great part of the husbandman's profits. Pococke's Travels, p. 210. The old French law dwells much

which is most expressly declared. The nuisance apprehended from pigeons is their eating up the seed-corn after it is sown; it hath of late been discovered however, that like most other animals who are persecuted for supposed mischief, they are of singular use, in consuming the seeds and weeds, as also the eggs of noxious insects, and the insects themselves. Every one who hath woods belonging to him orders the bird called a woodpecker to be destroyed. This bird however cannot perforate with his bill a tree that is sound, and therefore gives timely notice of its decay, after which it only *burtheneth the ground*, and should leave room for a profitable one to grow in its room. I could wish that a proper fable was added to the common collection, to impress an early sense of tenderness in children to

much upon the lord's right with regard to pigeons. Thus, in the Institutes Coutumieres, it is laid down, "que nul ne peut batir colombier à pied, sans congé de son seigneur." The lord had likewise a right to the young pigeons of his vassal, except in the March-flight. Coutumes de Rheims, p. 155. Hartlib (in his Legacy of Husbandry) supposes that there were in this time 26,000 dove-houses in England, and allowing 500 pair to each house, and four bushels yearly to be destroyed or consumed by each pair, makes by this calculation the loss of corn very amazing; $26,000 \times 500 = 13,000,000$ bushels. See Fuller's Worthies, p. 279. One cannot read any account of particular religious houses, without observing that the building a pigeon-house was a necessary article of expence upon all their estates. See Sparkes's Coll. Debes, in his *Færoa Referata*, gives us the following account of a law which prevails in those islands for the destruction of ravens. Every man who is capable of rowing a boat must at St. Olan's tide bring into the session-house the beak of a raven, which are laid in a heap and burnt. Those who have not any such beak to produce are obliged to pay *a raven fn'*, said to be a skin of the value of $2 \frac{1}{2} d.$

Harrison (in his Description of Britaine) observes on Polydore Virgil's supposing that rooks are encouraged in England from their destroying the worms. This Harrison ignorantly resents as as a reflexion on our soil. See p. 110. B.

animals of all kinds; their barbarity is often excused, under pretence of destroying what does harm.

I have now made some observations upon almost every statute of this reign. That Edward was a weak prince [o] is unanimously agreed by all writers and historians; yet the clamour against his government seems chiefly to have arisen from his having put too unlimited a confidence in favourites who were foreigners. The barons who deposed this unhappy king were certainly guilty of greater breaches of the law, than those whom they opposed; witness their murder of Piers Gaveston, which they were obliged to procure an indemnification for by the statute of *Ne quis occasionetur pro morte Petri de Gaveston*. Upon the whole (to consider Edward the second as a legislator), though it cannot be said that any law passed during his reign of great importance to his people, yet he seems to have had the negative merit of never having attempted to introduce any statute, which in any measure tended to derogate from their just rights and liberties [p].

After the eighteenth of Edward the Second, follow some statutes *incerti temporis*; no editor having been able to say with

[o] He was a Scholar, if the verses printed in Fabian's Chronicle are really of his composition, which Fabian supposes to have been written during his confinement; I do not from this pretend to say that he had a poetical genius:

“ Damnum mihi contulit, tempore brumali,

“ Fortuna satis aspera, vehementis mali.

“ Nullus est tam sapiens, mitis, aut formosus,

“ Tam prudens virtutibus, cæterisque famosus,

“ Quin stultus reputabitur, et satis despectus,

“ Si fortuna prosperos avertat effectus.”

[p] One of the most irregular prosecutions that can be laid to the charge of this king, is an appointment of particular justices to try the offence of supposing that miracles were performed at the tombs of Mountfort and Bouffer, who had been executed for high treason at Bristol in the seventeenth year of his reign. Petyt, Mss. vol. xviii. p. 131.

precision whether they belong to the reigns of Henry the Third, Edward the First, or Edward the Second; and I should apprehend, that the number of these *Uncertain Statutes* (if I may so call them) should be much larger.

The first of them is entitled, *An Ordinance for Bakers, Brewers, and other Victuallers, and for Ells, Busbels, and Foretallers.* The baker and the miller (as before observed on the statute of *Pillory*) are the first objects of the parliamentary regulations; and, in case of deceits, they are to be punished by the pillory, which, it should seem, in those times was not constructed as it is at present. The words of the statute are: “*Quod pilloria sive collistrigium habetur debitæ fortitudinis, ita quod contra delinquentes exequi possit judicium, sine corporum periculo.*” From which it may be inferred, that the criminal was suspended in the air by the *collistrigium*, or stretch-neck, in the same manner that children are sometimes put into swings, in order to stretch their necks and make them grow: the ridicule attending the delinquent, in this suspended situation, must have been infinitely greater than when he stands upon a floor. I have already ventured to inveigh against the impropriety of this [q] punishment.

The direction with regard to a miller's toll seems to be very vague and uncertain, as it is to be regulated, “*secundum fortitudinem cursûs aquæ,*” which would puzzle a *Smeaton* of the present times to estimate with accuracy; and I am afraid was infinitely beyond the civil engineers of those reigns. Less is to be found with regard to mills in the law of England, than per-

[q] There are some very sensible observations to the same purport in the Preface to the State Trials. The author of that Preface signs only the initial Letters of his name, *M. N.* which I have lately been informed is meant to be the signature of Mr. *Salom Emlyn*, the Editor of *Hale's Pleas of the Crown*. The letters *M. N.* are the final, and not the initial letters of his name, the reason for which must have been rather whimsical.

haps those of any other European country; it makes, on the other hand, one of the principal heads of the law of Scotland; as likewise of the Northern parts of Europe. The reason of this seems to be, that the inhabitants within a certain district are obliged, by the laws of other countries, to grind at the lord's mill, and at no other, of which there are some traces in our ancient customs; but this service is by no means general, and hath at last been almost universally dropt, from the great difficulty there is to enforce such a right [r].

The butcher and the cook are next made subject to penalties: the butcher, if he sells "carnes porcinas *supersennatas*, vel carnes "mortuas de morinâ." The word *supersennatas* is translated *meazled pork*, or, as is more generally termed, *measly pork*; the etymology of which expression I conjecture to be from the French word (*mesle*), or (*mingled*), as the flesh of a swine, when said to be *measly*, or *meazled*, is interspersed with white streaks or spots. I should doubt much however the propriety of this translation of the common edition of the statutes. I cannot in any of the Glossaries find the word *supersannatas*; the meaning of it however is very obvious, as I conceive it, to signify *unsound meat*; but there seems to be no foundation for confining it to that particular distemper in a hog, which makes the flesh appear meazled. It may be perhaps thought unnecessary to have dwelt so long upon the import of this word; but if a butcher was to be prosecuted upon this branch of the statute, the signification

[r] There is a manor oven (14 f. diameter) at Melton Mowbray, which hath full business; but the baker, in Sir Matthew Lambe's time, was for obliging every one to make use of it, though he could not serve all. The inhabitants intimated, that though they allowed Sir Matthew to have such an ancient grant, yet they were informed, that the old price for baking was also stipulated, on which Sir Matthew desisted from his claim. I received this information from a learned and ingenious correspondent, to whom I have not this only obligation.

must

must be settled with precision, otherwise it would be impossible to convict.

The butcher and cook, for the first offence, is to be heavily amerced; for the second, he is to be set in the pillory; for the third, he is to be imprisoned; and for the fourth, he is to leave and abjure the village or town in which the offence is committed; which I the rather take notice of, as it seems to be the only instance in our law of punishing by a banishment from a particular place or district [5].

This statute concludes with most terrible denunciations against forestallers, which, as they are more florid and rhetorical than most part of the statutes (except perhaps the preamble to an act in the last year of Edward the First, which I have already taken notice of) it may not be improper here to insert, as a specimen of the legislative rhetoric of this country: “*Præcipue*
“*ex parte Domini Regis præcipitur, quod nullus forestallarius*
“*patiatur in villâ commorari, qui pauperum depresso est ma-*
“*nifestè, et totius communitatis, et patriæ publicus inimicus;*
“*qui bladum, pisces, allec, vel res quascunque venales, per ter-*
“*ram vel per aquam venientes, obviando præ cæteris festinant,*
“*lucrum siliens vitiosum, pauperes opprimentes, et divitiores deci-*
“*pientes,*” &c. I have already had occasion to express my sentiments with regard to the laws against forestallers and regraters; and should almost wish that they were expunged [1]
from

[5] As for the common abjuring by criminals, that is a banishment from the island.

[1] They are now indeed repealed, and though I am not vain enough to ascribe this to what I have happened to throw out in the former editions of this work, yet I have the satisfaction to find that some other alterations in the law, which I have suggested, have been adopted by the legislature.

It is not very easy to settle an accurate distinction between the offence of the *forestaller* and the *regrater*. The French use the word *regrattier* to signify the same with a *retailer*, “*des alcoves destinees pour quelques*
“*regrattiers,*

from the statute-book, as the consequence of putting them in force must for ever be to raise the price of provisions. It must be admitted, however, that the want of a good communication between place and place might have aciently made these laws rather less absurd than they appear to be at present. When a district of country depended entirely upon the corn and other provisions which were raised within itself, a wealthy forestaller might, by preemption, have in some measure insisted upon his own price.

“*regrattiers* qui y vendoient leur appas.” Wiquefort’s translation of Figueroa’s embassy to Persia, p. 95. A forestaller is, “*stalli fori violator*” Houard’s Littleton, t. i. p. 314.

I do not recollect to have met with a good etymology of the word *badger*, used always in these laws against forestallers. Harrison * describes a *bodger*, as he terms it, to be a sham person employed by the substantial farmer to buy up the corn. This perhaps may have made some country wit to compare him to the badger, who makes his hole for the use of the fox.

* Description of Britayne, p. 86. A.

STATU-

STATUTUM QUOD VOCATUR DE RAGMAN
DE JUSTITIARIIS ASSIGNATIS.
INCERTI TEMPORIS.

I HAVE somewhere met with an interpretation of the word *Ragman*, used in the title of this statute, but cannot recollect in what author. Du Cange cites the old Chronicles to prove, that it signifies the same with *Charta*, or *Litteræ patentes*. I cannot however see in what this is applicable to the subject-matter of the statute, which relates to no particular grievance or provision with regard to *Charters*, or *Letters Patent*; and I shall always think it right in this comment not to pass unnoted a difficulty which I am not able to explain, but which perhaps may be cleared up by others [*u*].

The

[*u*] Since the former editions, I have happened to meet with an instrument in Rymer of the first year of Henry the Fourth, which is entitled, *De raggemannis comburendis*, and explains this word to have signified blank recognizances, which persons, threatened with prosecutions, had entered into, and deposited in Chancery, during the preceding reign. Hence a (perhaps whimsical) conjecture arises with regard to the etymology of the word *Ragman*. He who had signed such a blank recognisance was absolutely in the king's power, and might therefore (if the penalty or fine inserted was considerable) be looked upon as utterly ruined in his circumstances, and in rags. There is in Mr. Petyt's Collection of Mss. an order of the first of Henry the Fourth, by which every sheriff is directed to burn the Raggemans (or *Blank Charters*) which are described to be confessions of treason or other offences extorted by the menaces used by the late king. They are for this reason ordered to be publicly burnt. vol. xxxii. p. 65. This word *Ragman*, however, seems to have had no very precise meaning annexed to it, as an inquest taken in Bretagne during the fiftieth year of Edward the Third is so called in Mr. Petyt's *Theatrum Criminalium*, vol. ii. p. 169. B. It is likewise used by Gawin Douglas: as,

"I thocht

The following passage in this short statute is certainly misprinted: "Que nul enquerelant, ne respoignent, ne soit empris per hokettes ne per barettes;" the word *hokettes* is said, by Du Cange, to be synonymous with the following term *barettes*: now the word *empris* being changed to *surpris*, and *ne respoignent* to *respondant*, it will run thus: "Que nul enquerelant, ne respondant, soit surpris par *hokettes* ne par *barettes*;" and the meaning will be, that no plaintiff or defendant shall be surprized in his cause by the tricks of a baretor [*w*]. In these corrections I have not deviated much from the original, and the sense, as well as context, seem to require such alterations. It must be remembered, that the present statute hath not been translated, and therefore seldom, if ever, enforced: mistake follows mistake consequently in the repeated editions of such laws, as scarcely any one ever peruses them with attention, not even the editor, who is not checked by a marginal version. I have had thoughts of translating these laws from the old and barbarous French, in which they are enacted, and the having read with attention all the ancient statutes in the original, would perhaps enable me to form the best Glossary for such a work: I have however been deterred from this by the old Greek adage, of *μεγα βιβλιον, μεγα κακον*.

"I thocht have fenit,

"In ryme an *ragmen* twise als curiouse,

"But not be tuentye part, sa sentencius."

Pref. to B. i.

"to rede I begane

"The royetest ane *ragment*, with mony royet rime." Prol. to B. viii.

In both which passages it signifies the same with the Italian word *ragionamento*, or a discourse or argument.

The Glossary to Gawin Douglas then supposes that what he calls the famous Ragman's Roll (in which the Nobility and Gentry of Scotland were tyrannically constrained to subscribe allegiance to Edward the First) might be hence derived. But what hath a word, which signifies discourse or argument, to do with the title of such a Roll?

[*w*] The word *barat* is rendered, in the Glossary to the Life of St. Lewis, by *fraude*, *perfidie*.

CONSUE-

CONSUETUDINES ET ASSISA FORESTÆ,

INCERTI TEMPORIS.

THERE are two or three things, rather relative to the words made use of in this statute than the subject-matter or provisions of it, which may possibly deserve some notice. The learned Mr. Cay, in his Preface to the Abridgement of the Statutes, hath observed a most palpable mistake in the following clause: “ Ut memorialiter habeatur quid sit viride, sciendum est “ quod omnes arbores fructum portantes, et etiam hæ quæ “ tenent viriditatem per totum annum, et fraxinus, si antiquitus “ usus fuerit intra forestam, et *arabilis*, quæ Dominus Rex est in “ *sefinâ*.” The whole of this explanation, with regard to what shall be deemed *vert* in the forest, most clearly relates to *trees*, and therefore it should be read *erabilis* (viz. a *maple-tree*), and not *arabilis*, signifying *arable land*; this is the more evident from the other tree which precedes it, viz. *fraxinus*, or an *ash*, the statute directing that neither shall be considered as *vert*, nisi *antiquitus usus fuerit*.

The word *bercator* occurs afterwards, which is not very commonly to be found in our ancient records. It is generally used, by those who have translated the old laws of Norway, Sweden, and Denmark, into Latin, as signifying a *shepherd*, and is a contraction of the word *vervicator* [x]; becoming thence *berbicator* and *bercator*, by the known rule in etymologies of “ *literæ ejusdem organi sæpiissime mutantur* [y].”

[x] From *vervex*, an *ewe*.

[y] Thus the name *Jovianus*, in Greek, becomes Ιοβιανός; as also *Octavianus* becomes Οκταβιανός.

By the same clause, if any of the deer are found dead, or wounded, it is humanely directed, that they shall be sent to the next house of *Lepers*. We hear little of the leprosy in our Histories or Chronicles, and this is perhaps the only instance of its being mentioned in any law [z]; though there are several of the ancient Scotch statutes which relate to it. Hentzner indeed, who was in England during the reign of Q. Elizabeth (and perhaps the first *travelling tutor* to a young nobleman in

[z] There is a Writ, however, in the Register, *De leproso amovendo*. Henry the Second, by his will, leaves 50,000 marks, “domibus religiosis totius Ierosolymæ, et leprosis, et inclusis, et eremitis ejusdem terræ.” Rymer, vol. i. part. i. p. 19. It appears also, that there were houses to receive women who laboured under this terrible disorder, by an instrument in Rymer, which is entitled, *Bulla pro Priorissa Leprosarum de Pratis*. This hospital was somewhere in the diocese of Lincoln. See Rymer, vol. i. part. ii. p. 19. Gul. Nubrigiensis (who died in the year 1208) makes also mention of a noble hospital, for the reception of lepers, near Durham. See l. v. c. viii. As does Stowe, of different hospitals, for the same purpose, viz. the *Loke*, in Southwark. B. iv. p. 26. Another at Mile end. Ibid. p. 48. And a third, in St. Giles’s Fields. Ibid. p. 74.

“Better than a *lazere*, or a beggere.”

Chaucer in the Character of the Friar.

Montfaucon, in his French Antiquities, gives us an engraving from painted glass in the Abbey of St. Denis, which represents Saint Lewis giving food to the lepers. The line under the window is,

“Multum leprosis datur hic cibus a Ludovico.”

Montf. t. ii. p. 158.

There were likewise so many lepers at Paris in the year 1321, that they were burnt together with the Jews, both of them being charged with a conspiracy, Montf. t. ii. p. 227. Their numbers therefore must have been formidable.

It seems to have continued in Cornwall till Carew’s time, who published in 1602. See p. 68. where he attributes it partly to their eating fish, particularly the livers, and partly to its being an hereditary complaint in certain families.

the tour of Europe), says, that the English were at that time much subject to the leprosy. I should doubt much whether this supposed leprosy was more than the scurvy; and, if we ever had this horrible distemper amongst us, it is not impossible that greater cleanliness by change of linen, as also the use of tea having abolished the more solid and substantial breakfast of meat, may have much abated its rigour. After all, perhaps, the leprosy here alluded to by the statute may not be the *elephantiasis* [a], but only a kind of *itch*, which the inhabitants of poor and mountainous countries are subject to from a poverty of diet. I submit this however, with great diffidence, as I am sensible of the impropriety in *alienas segetes falcem demittere*.

[a] Lucretius indeed informs us, that the Elephantiasis is peculiar to Egypt:

“Est elephas morbus, qui propter flumina Nili

“Gignitur Ægypto in mediâ, nec præterea usquam.”

L. iv. ver. 112.

Samonicus, who was præceptor to the younger Gordian, in his Treatise de Medicina, describes it in the following manner:

“Est elephas morbus, tristi quoque nomine dirus,

“Non solum turbans infandis ora papillis,

“Sed cita præcipitans funesto fata veneno.”

See Maittaire's Corpus Poetarum, vol. ii. p. 1593.

The four marks to know whether a person is leprous or not are mentioned by the physicians of Edward the Fourth, who were to certify his Majesty, whether a woman was to be confined for this distemper. They are described to be, “Alopecia, Tiria, Leonina, et Elephantia.” They also certify, the twenty-five symptoms which should concur in a person's case who was truly leprous, and that few of these appeared in the case referred to them. See Rymer, vol. v. part ii. p. 167. A. D. 1468, 8 Edw. IV.

STATUTUM ARMORUM AD TORNIAMENTA, IN CERTI TEMPORIS.

THIS statute may very well merit the attention of the herald or the reader of ancient Romances [b], as there are many terms used in it which relate to chivalry and armour. The chief intent of the legislature by this law seems to have been, to restrain the great numbers, by which the knights were attended at these expensive and strange festivals. From the inconvenience and riots occasioned by them, we find many proclamations in Rymer to forbid the use of them in particular places, and the lands of those who justed, or *bordearunt* [c], according to the Latin term, were seized into the king's hands. A judicious collection of the Royal Proclamations from Rymer and others, in a regular series of time, would not be without its use,

[b] Gul. Neubrigiensis attributes the introduction of Turnaments into England to Richard the First, and observes, at the same time, that though they had been prohibited by two popes, and two councils, “fervor
“tamen juvenum armorum vanissime gloriam affectantium, favore
“principum probatos habere tyrones volentium, ecclesiasticæ provisionis
“usque in præsens sprevit decretum.” See l. v. c. iv. B.

[c] The word seems to be derived from *borda*, a *club*, whence the French term of *border*. *Burdare barbaris est jocare*. Pref. of Dr. Grey, to his Edition of Hudibras, p. xviii. who refers to Bourde (*jocus*) in Junius's Etym.

“At Aleffandre' he was whan it was won,

“Full oft times he had the *bord* begun;

“Above all nations.”

Chaucer, in the Character of the Knight.

Henry the Second of France being killed by accident in justing at one of these *Turnaments*, was probably the occasion of their being totally disused; the introduction of fire-arms must likewise have contributed

use, and would throw light upon many points of the ancient law [d].

tributed to these military amusements and pageantry being laid aside. Richard the First procured large sums for licensing Turnaments. Hoveden p. 746. It should seem also, from an instrument in Rymer during the reign of Edward the Second, that, if any one (in tilting at a turnament, for which the king's licence had not been obtained) killed another, it was necessary to procure the royal pardon. Vol. ii. part i. p. 148.

[d] There is such a collection from the time of Henry the Eighth to Charles the First in the Library of the Society of Antiquaries, as also in that of Queen's College, Oxford. The Proclamations from the reign of Q. Elizabeth have been regularly printed.

STATUTUM DE JUDAISMO,

INCERTI TEMPORIS.

PRYNNE [*e*] fixes the time of this statute to the fourth year of Edward the First, contrary to the opinion of Sir Edward Coke, who supposes it to be a law of the eighteenth year of that king's reign. It contains some curious particulars with regard to the terms upon which the Jews were then tolerated in this country. By the second section, the *good Christians* are not to take *above half* their substance. By the fourth section, a Jew, when above seven years of age, is to wear a particular mark of *two cables joined* upon his upper garment; the same section declares, "*qu'ils font les serfs du roy*," and, by the eighth, no Christian is to be permitted to lye in their houses [*f*]. Notwithstanding these severities, a Jew is permitted, by the last

[*e*] Collection of Records, vol. iii. p. 153.

[*f*] "*C'est la meme chose de coucher avec un Juif, que de coucher avec un chien; et ce sont nos peres.*" Voltaire, in speaking of the persecution of the Jews, and the severe laws against them.

"Si Christianus cum Judæâ, aut Judæus cum Christianâ rem habet, debet unius corpus corpori alterius imponi, et ita utrumque flammis consumi." Speculum Suevicum, cap. 317.

A law of Venice, made in the year 1443, is comparatively mild: if a Jew lies with a common prostitute who happens to be a Christian he is to suffer an imprisonment of six months. St. Venet Venetiis, 1729. p. 11. B. It appears, by the same ordinance, that one of the chief employments of the Jews at that time was to teach children to sing, which they are most expressly forbid to continue. Ibid. By the laws which obtain in the states of the king of Sardinia, the Jews are obliged, under penalty of three days imprisonment, to keep within their doors during Passion-Week; nor are they permitted to play upon any musical instrument during their confinement. Leggi e Costituzioni di S. M. tante di qua, che di la *da monti e colli*. Torino, 1723, Folio. c. 6.

chapter of the law, to purchase an house and curtilage (or close adjoining), which an enlightened parliament of the eighteenth century would not permit some few years ago.

D'Blossiers Tovey published a treatise in 1738, upon the antiquities which relate to the Jews in England, in which there are some extracts from the chronicles which deserve notice; it is by no means however so complete as a collection of this kind might have been made.

When this persecuted people was most favoured, their condition was intolerable; and all that can be said by way of justification for our ancestors is, that they were rather more mildly treated in England than in the other countries of Europe. The first regulations which relate to this unhappy sect are those of the reign of Henry the Second, to be found at the end of Wilkins's Anglo-Saxon Laws [g]. They were much oppressed likewise in the reign of Henry the Third, as appears in the Appendix to the second volume of Prynne's Records. Howel [b] tells us this story of what happened to a Jew in the reign of Henry the Third. He had by accident fallen into a privy on his Sabbath, being a *Saturday*, and would not suffer any one to take him out, though *rather a necessary work*. Common humanity should not have permitted this obstinate adherence to a religious ceremony; however, the earl of Gloucester not only suffered him to continue in this filthy condition his own Sabbath (being Saturday), but would not permit any one to take him out on the *Sunday*, being *the Sabbath of Christians*: the Jew, by this cruel joke, was suffocated; nor do the chroniclers of the time reflect upon the barbarity of it [i]. We cannot be much surprized at this, as the Compiler of the Annals of Waverly speaks thus

[g] P. 347.

[b] In his *Londinopolis*.

[i] A rich Jew not ransoming himself, King John ordered, for seven days successively, one of his great teeth to be pulled out; upon which he at last submitted to pay the king 10,000 marks of silver. Stow's Chronicle,

thus of a general massacre of this people, "*Judæos occidentes, et bona eorum diripientes, et per omnia benedictus sit Deus qui tradidit impios [k].*"

It must be said however to the honour of Thomas Wykes, who is perhaps the best writer among the old Chroniclers, that he expresses himself with proper humanity, after having mentioned a persecution of the Jews by Edward the First, "*Anno 1263, Londinenses, non zelo legis, sed cupiditate lucri allekti, Judæos crudelissime trucidabant, nec sexui nec ætati parcentes, et licet non sint Christiani, inhumanum et impium videtur eos trucidare sine causâ [l].*"

Notwithstanding this most shocking barbarity, and a continued series of massacres of this defenceless people, the kings of England occasionally shewed them protection; but this was like that of the kings of Denmark to the city of Hamburgh, the motive nicle, p. 168. In the second year of Henry the Third, particular judges were appointed by that king to decide any dispute between those who were taken under his special protection (*Judæis nostris*) and the English Christians. — Petyt, Mss. vol. ii. p. 53. By an ordinance of King John likewise, a Jew could not assign a debt due to him by a Christian, which his Successor Henry the Third took advantage of by selling licences for such a dispensation. Petyt, Mss. vol. vii. p. 261. 263. where the word Jew is spelt *Gyn*. It appears by Mons. Brussel's late Treatise on the French Fiefs, that the king of France, and even some of his great subjects in particular districts, made the same extortions from the Jews. See vol. i. p. xlv.

[k] Gale's Coll. vol. iii. p. 163.

[l] P. 59. The Emperor Lewis also expresses himself most humanely with regard to the Jews: "*Nous rendons homage au precepte de l'Evangile qui enjoint d'assister ceux qui professent notre foi; mais bien loin de penser quiece precepte defende d'etre bienfaisans envers ceux qui suivent une autre loi, nous pensons que les secourir c'est remplir les vues de la Divine Providence, qui comble de grace tous les hommes.*" *Littera Lud. Imper. pro nonnullis Judæis. Notice de Diplommes, p. 456.*

for

for which hath been to let the sponge fill for a time, that they may afterwards squeeze the more out of it. Voltaire supposes these persecutions to have been caused by the great decrease of money in Europe by the crusades, which was falsely attributed to the Jews engrossing it [m]. Possibly this might contribute amongst other reasons; but the prejudices against this singular sect of religion were sufficient in times of ignorance to have occasioned the miseries which they endured, and which they still, in some measure, suffer in many parts of Europe [n]. These prejudices being so strong, it is certainly humane in the English law to allow them a trial *per medietatem linguæ* [o]; which, Selden informs us, they had a right anciently to claim. This indeed is not the modern practice; and it is to be hoped, that religious controversies will never make it necessary.

[m] One of the causes of the persecution of the Jews arose from a notion, that they killed the children of Christians in order to use their blood in medicine. Gower (in his second Book *De confessione amantis*) says, that this was prescribed to Constantine for the cure of his leprosy, but that he refused to try the medicine, and for that piety was miraculously healed:

“ They would him bathe in childe bloode,

“ Within seven winters age,

“ For as thei sayen, that shulde assuage

“ The lepre” F. 45. B.

A notion still prevails in *Austria*, that, when a criminal is beheaded, the blood drunk immediately, which springs from the neck, is a certain cure for the falling sickness. *Brown*, who mentions this, was an eye-witness of its being received in a jug for this purpose. *Travels*, p. 155.

[n] Gemelli the (famous traveller), who was at the siege of Buda in 1686, says that the Jews, who were found in the town, were immediately sold by the Imperial army as slaves. Sir Thomas Smith also observes, that in his time they were considered as slaves in all parts of Europe. *Commonwealth of England*, p. 125.

[o] Our ancestors, it is true, could persecute the Jews; but they would not persecute them by the mockery of a trial, consisting of judges who were prejudiced.

ARTICULI ET SACRAMENTA
MINISTRORUM REGIS
IN ITINERE JUSTICIARIORUM,
INCERTI TEMPORIS.

THIS statute consists chiefly of the oaths to be taken by those officers who are obliged to attend the king's justices in eyre, particularly the sheriff, under-sheriff, and bailiffs. As the county-towns are necessarily crowded upon these occasions, it directs, that no fairs shall be held during the assises[p], "sed quod comitatus teneatur solummodò ad *profrus* faciendos." The word *profrus* is a very uncommon one, but signifies the same with the plaintiff's suit: this is the sense of the French word *profre* in Britton, which answers to the *producit se*. "Jehan de Hayes se *profre* vers Thomas de Bruce [q]." The next direction is, that no one shall take up or hire an inn during the eyre, "sed venientibus *gratis* concedatur:" which regulation, if it was to take place in these days, towns would not be solicitous to have the assises.

[p] By a preceding statute (*incerti temporis*) it is stated, that there were at this time only four circuits; they were thus divided, York, Northumberland, Westmoreland, Lancaster, Nottingham, and Derby—Lincolnshire, Warwickshire, Leicestershire, Staffordshire, Northamptonshire, Rutlandshire. Gloucestershire, Herefordshire, Worcestershire—Cornwall, Devonshire, Somersetshire, Dorsetshire, Wiltshire, Southamptonshire, Oxon, Berkshire, Suffex, and Surrey—Kent, Effex, Hertford, Norfolk, Cambridgehire, Huntingdon, Bedford, and Bucks. It appears also, by Ames's History of Printing, that before the statute of Henry the Eighth, which annexes Cheshire to the Welsh circuit for the counties of Denbigh, Flint, and Montgomery, Cheshire was frequently added to the Northern circuit.

[q] Britt. p. 41.

DE MAGNIS ASSISIS ET DUELLIS,
INCERTI TEMPORIS.

THIS statute regulates the different actions in which the trial by battle, or by the grand assise, is to take place. The law is very short, and contains nothing very particularly to be noticed, except that there should be such minute regulations about so absurd and impious a method of decision. The last trial by battle in England was in the time of Charles the First, and that did not end in the actual combat. It is amazing, that it should have continued so long in so many different parts of Europe; and the reason for the tolerating of it seems to have been, that the lord in most districts had the appointment of the judge, who, either himself or his lord, was interested in favour of one of the parties litigant; this might perhaps drive the other party, who suspected this prejudice against him, to appeal to the chance by combat. There is a story in Grafton's Chronicle[r], which must have likewise made this trial infinitely ridiculous. A citizen of London, in the time of Henry the Sixth, was of a strong make, but of a faint heart: he happened to be obliged by this kind of decision to enter the lists against an antagonist, who was both weak and puny: the friends of the citizen, to give him better spirits, dosed him with *aqua vita*, so that he was very drunk when he began to engage, and fell an easy prey to his adversary.

Montesquieu [s] hath deduced the affront given by the lye from this trial, as when the defendant denied the plaintiff's allegation,
the

[r] P. 150.

[s] Esprit des Loix. *Steirnbook* in (his Treatise De jure Sueonum vetusto) says, that the trial by duel was at first used by the ancient Suedes (as it is at present) to decide disputes occasioned by words of contumely,

the court ordered the point in dispute to be determined by combat. Is it necessary however to have recourse to reasons derived from ancient customs, to shew, that the lye given must raise the warmest resentment in a person of liberal education and disposition [t]? Mutius, in a regular treatise upon duels and the trial by battle, lays it down as a general rule, that he who gives the lye is the defendant. As, if *Antonius* says *Lucius* is a traitor, and *Lucius* answers, *he lyes*, *Antonius* must insist on the duel [u].

or reproach, rather than to determine points of doubt. He likewise cites an old law of the Goths, which is thus translated: "Si dicat vir viro probrosum verbum: *Non es vir viri compar, aut virili pectore, ego verò sum*" (inquit alter) *qualis tu; Hi in trivio conveniunt.*" Cap. vii. p. 77.

The most easy method of a criminal's proving his innocence, amongst all the extraordinary modes of trial which prevailed anciently, seems to have been what *Muratori* styles the *judicium panis et casei*. If, after the priest had blessed this very palatable food, the prisoner was able to swallow it, he was acquitted. *Muratori's Antich. Ital.* vol. ii. p. 382. Napoli, 1752, 4^{to}. Hence perhaps the expression of, *I wish it may choak me*.

[t] There is an engraving in Montfaucon of a combat between a French gentleman and a dog in the year 1371, which was expressly ordered by Charles the Fifth of France, to determine whether the criminal had been guilty of a murder. See *Antiq. de la Monarchie Fr.* t. iii. p. 70. where the whole story is related at length; and the issue is said to have been, that the Chevalier *Macaire* (who was accused of the murder) being nearly strangled by the dog, confessed his guilt.

[u] Il duello del Mutio. Vinegia, 1566, 8^{vo}.

STATUTES MADE AT NORTHAMPTON,

2 Edw. III. A. D. 1328.

THESE statutes made at Northampton consist of seventeen different chapters. They are preceded by other *capitularies* of the first year of Edward the Third; and, taken together, shew the very great confusion in which the kingdom was involved during the reign of Edward the Second. As the statutes however become more modern, they are more clear and intelligible, as likewise generally relate to what hath been before observed upon. I have therefore left them to speak for themselves, and shall seldom obtrude any remark which does not seem to be necessary for the illustration of the law under consideration, or to bear some relation to it.

The 2d chapter regulates in what cases pardons shall be granted, and confines them to those instances only where the king is obliged to pardon *by his oath*, “ cest a sçavoir, ou homme “ tue autre foi defendant, ou en cas fortuit.” On such an accident (for I cannot call it a crime, which always necessarily implies a bad intention in the perpetrator) the king was obliged, says the statute, to grant a pardon by his oath, meaning undoubtedly his coronation oath [w], in which he swears to *administer*
justice

[w] The advice of archbishop Eadriga to Edward, when he was crowned A. D. 1042, is mentioned in the Saxon chronicle; but it does not appear that the king took any coronation oath. The coronation oath of the kings of England, in the time of Henry the Third, appears by Bracton to have been the following: “ Debet enim in coronatione suâ in “ nomine Jesu Christi, præstito sacramento, hæc tria promittere populo “ sibi subdito. Imprimis, se esse præcepturum, et pro viribus opem impensurum, ut ecclesiæ Dei, et omni populo Christiano, vera pax omni tem-
“ pora

justice in mercy. I have already observed, that this power of pardoning was abused by the kings of England and other countries [x]. Patin the Antiquary informed bishop Burnet, whilst at Padua on his travels, that 35,000 criminals had procured pardons by a general act of grace from the State of Venice, in order to raise a considerable sum of money which the government then wanted. Upon Burnet's distrusting this information, from the very great number who were said to have had their crimes remitted, Patin told him, repeatedly, that he might depend upon the accuracy of his account. Francis the First of France gave car-

“*pore servetur.* Secundò, ut rapacitates omnes et iniquitates interdicat.

“*Tertiò, ut in omnibus judiciis æquitatem præcipiat, et misericordiam.*”

Bracton, lib. iii. cap ix. I have the rather here inserted this form of the coronation oath, as it seems to imply an obligation not only to preserve the peace at home, but that a king shall not wantonly molest other nations; which is a duty that cannot be made binding by too many ties. For the form of the coronation oath, which was taken by Edward the Second, see the *Theatrum criminalium* amongst Mr. Petyt's Manuscripts in the Inner Temple Library, vol i. p. 28. The Emperor of Japan upon his accession undertakes to secure fair weather at proper times. Gemelli, vol. v. p. 197.

[x] There is a very singular law of the ancient Goths, whilst in Spain, against any one's soliciting the king for a pardon; but he may grant it, however, of his own accord. *Fuero Jusgo*, lib. vi. p. 320. This is the more extraordinary, as the king is frequently enjoined by those laws to *exercise justice with mercy*; and without a solicitation he cannot very well hear of the circumstances which should incline him to shew such mercy. By the *Fuero Real de España* there is a law, that a traitor or murderer shall not be pardoned either by the king on the throne, or his successor. It appears likewise in Brissotius's most learned treatise, *De regio Persarum principatu*, that the kings of Persia (despotic as they were) could not pardon any capital crime; and this possibly may be chiefly alluded to by the passages in scripture, which mention the law of the *Medes and Persians as altering not*. In Holland there is no power to pardon, if there is not a Stadtholder. Confid. on the law of Forf. p. 100. This magistrate, however, is but an accidental part of their constitution.

dinal Wolfey, who was sent on a pompous embassy by Henry the Eighth, the power of pardoning all the criminals in every town in France through which he should pass[y]. The Commons, in the 27th of Edward Third, represent, that the king is imposed upon, in pardoning malefactors, by their falsely suggesting that they mean to serve him abroad in his wars, whereas they often returned and repeated their crimes[z].

I should imagine, however, from these continued complaints with regard to pardons, that it was not only the abuse by the crown which occasioned the clamour against them, but the consequences in point of interest to the barons. Most of them had very extensive jurisdictions and grants of forfeitures, of which they were deprived by the king's pardoning offences, *et hinc illæ lacrymæ*.

[y] Rymer, vol. vi. part ii. p. 81. A. D. 1527. 19 Hen. VIII.

[z] Petitions in Parl. vol. ii. p. 253.

STATUTES MADE AT YORK,

9 Edw. III. A. D. 1335.

IT appears by the preamble to these statutes[a], that the English would not permit aliens to trade in this country, at least not without frequent disturbances, which I am afraid they are too much inclined to raise in the present times, and from the same prejudices. The law therefore enacts, that *merchants, aliens, and denizens*, and all others, may buy or sell, “blez, vins, avoir de pois, chares, peffons, et tous autres vivres, et vitailles, lains, draps, et autre merchandise.” *Avoir de pois*, used in this clause, is rendered in the common translation (which, when there is any real difficulty, generally leaves it as it stands) by the same seemingly unintelligible words. I was first inclined to risk a bold *Bentleian* conjecture, that it should be read *avoin et foin*, i. e. *oats* and *hay*, which would agree very well with the context, and are not words very different from *avoir de pois*. I have, since the former editions, however, found by a passage in Joinville’s Life of St. Lewis, that the signification of these terms is any kind of bulky commodity.

In the statute of Acton Burnel, *avers* is used by itself without *de-pois*, “pur ceo que Merchauntes ont pristes lours *avers*.” Thus also the Italians use the term *averi*, “che vi si consumano gli *averi* delle intire familie[b];” see also Schilter’s Teutonic Glossary, in the article *AVERS*[c].

[a] It is very remarkable, that, 4 Edw. III. ch. xiv. it is directed, a parliament shall *at least* be held once in a year; and yet we have no statute from the fifth till the ninth year of his reign.

[b] Gemelli, vol. v. p. 23.

[c] Printed at Stockholm, in 1727.

The legislature having given these privileges to the alien merchant, afterwards puts one very singular restraint upon him, viz. "that he shall carry *no wine out of the realm*;" which, I dare say, will at first be thought to favour the prevailing notion, that England formerly produced great quantities of wine. One should imagine that the latitude, in which this island is situated, sufficiently contradicts what is so generally believed at present; and all experience shews, that the northern parts of Europe grow warmer, in proportion to their cultivation: from which it is very clear, that England is more proper for vineyards in the eighteenth century, than it could have been in the thirteenth or fourteenth. This notion seems to have been chiefly taken up from some old family deeds, that make mention of *vineæ*, but which Sir Robert Atkyns hath proved to signify only orchards, and that cider and perry were called *vina*, or *wines*.

As I therefore cannot agree to what may be thought the most obvious interpretation of this part of the law, it may perhaps be expected that I should explain it in a manner that may be more satisfactory.

Though we generally suppose at present, that the taste for the French wines in this country hath been occasioned by the additional duty (as dearness often constitutes the chief merit of what is called a delicacy); yet it appears by all the old statutes, that the French wines, and particularly those of Gascony, were almost the only wines imported[d]. The provinces which produced

[d] Besides the proof arising from the old Statutes, Chaucer, in the Character of the Shipman, hath the following lines:

"And certainly he was a good felawe,
 "Full many a draught of wyne had he ydraw
 "Fro Burdeux ward, while that the chapmen sleep,
 "Of nyce conscience toke he no kepe."

H h

Bishop

duced them at this time belonged to the English crown; and therefore, in point of patriotism, there was the same reason for promoting the sale of them, that there would be for the consuming of wine which were of the growth of our colonies[e].

It was a matter of policy therefore to the common sovereign of the two countries, that the English should be supplied with wine from the French provinces at a reasonable rate, and consequently that there should be a high duty on these wines if ex-Bishop Hall also (in his Imitation of Juvenal,

“ Ipse capillato diffusam Confule potat,

“ Calcatamque tenet bellis socialibus uvam,”

(where he describes the great man reserving the costly wine at his end of the table, and circulating only a cheap sort amongst his dependants,) says, that the English lord kept the wine of Bourdeaux to himself. This early use of claret in England, from our own provinces, and the restrictions on those of France, may likewise in some measure account for the French not being fond of this sort of wine: we have been used to it, and they have been accustomed to the wines of other provinces which are nearer to Paris; we shall never relish frogs, nor the French perhaps puddings.

[e] It should seem that the balance of trade was greatly in favour of England whilst we were in possession of the French provinces, from the old French saying, “ J’ay payé tous mes Anglois;” and the word *Anglois* is often used as synonymous to *creancier*, or *creditor*. See the Preface to Cotgrave’s Dictionary, as also Borel’s Glossary, who cites these ancient verses:

“ Que ne vy onques Anglois de votre taille,

“ Car a tous coups vous criez, *baille, baille.*”

Since the first edition, it hath been suggested to me by a person whose name (from his deserved eminence in the literary world) I should be most proud here to mention, that in almost every treaty with France, from the time of Edward the Third to that of Henry the Eighth, there are stipulations for money due from the French to our nation, but that seldom any real payments were made to the English, which may likewise have contributed to the words *creancier* and *Anglois* being used as synonymous. See also a particular chapter on this head in Pasquier’s *Recherches de la France*, p. 723.

ported

ported elsewhere, or even sent to the adjoining provinces of France: this regulation might occasion also the employing alien merchants, who purchased the wines in England without paying this high duty, and afterwards re-exported them. It was therefore wise and prudent to put a stop to the inconveniences arising from general importation without proper restrictions, especially when it thus became the means of supplying foreigners with the wines of the French provinces (then belonging to the crown of England) without paying the duties.

The constitution now began to be understood. Edward, the first of the name, could not exert any supposed prerogatives or his crown, as was now the point of decision was against the crown, and could not, without the assistance of parliament, to supply, was ready to make concessions. These concessions were even as they had succeeded according to the most sanguine expectations, would possibly have made England a province of France, and we perhaps we put of our liberties to the distance of which they retained the crown, not will the constitution in this country ever be so much endangered as by a king whole Henry the Seventh and Henry the Eighth by the council in which this council was held, it is to be seen: it

H h 2

THE

THE STATUTE OF PURVEYORS,

10 Edw. III. Stat. ii. A. D. 1336.

THIS act of parliament consists of five chapters, followed by five articles; and there is an express memorandum on the roll, “*Quòd in parlamento predicto concordatum fuit, quòd “artículi predicti non tenerentur pro statuto.”*” After this memorandum follows a writ, “*T. Rege apud Eltham [f] primo “die Aprilis,”* in which the king directs the sheriff to proclaim certain statutes *made by the assent of the Lords and Commons*, and likewise *quendam articulum per nos et concilium nostrum super providentiis pro hospitio nostro, et hospitiiis consortis nostræ, ac liberorum.* This seems to be the first strongly-marked distinction between a proclamation by the king in council and a law which had received the assent of the lords and commons.

The constitution now began to be understood. Edward, during his minority, could not assert any supposed prerogatives of his crown: he was now also on the point of declaring war against France, and consequently, wanting the assistance of parliament for supplies, was ready to make concessions. These continental wars (even if they had succeeded according to the most sanguine expectation) would possibly have made England a province of France; but we perhaps owe part of our liberties to the distresses in which they involved the crown [g]: nor will the constitution of this country ever be so much endangered as by a king whose coffers are full. Henry the Seventh and Henry the Eighth, by

[f] The great hall in which this council was held is still to be seen: it is a very noble building, and is at present used for a barn.

[g] Henry the Fifth, in the midst of his conquest, was obliged to pawn the crown-jewels.

these

these means, established every thing but absolute monarchy; and Queen Elizabeth, by the œconomy of her treasurer *so much commended by Historians* [b], was enabled to continue the same despotic government.

I have before observed, that Edward was now on the point of declaring war against France. The 4th chapter of this statute shews, that he was raising cavalry for this purpose; and that the purveyance for the great horse [i] (*les grands chevaux*) was a grievance severely felt by the subject; particular commissioners are therefore appointed, to hear and determine complaints of this oppression.

[b] I do not by this mean to condemn œconomy in a Lord Treasurer, but only to intimate that a king may be too rich; though it does not follow from this, that he should be necessitous.

[i] The great horse (in Latin, called *cataphracti*) were those which carried men, who were covered with a complete suit of armour, and who were absolutely invulnerable before the use of fire-arms, if they did not fall from their horses, which were likewise covered with iron plates; this prodigious weight required the strongest and largest horses. The light cavalry, afterwards mentioned, were called *hobelarii*, from the riders being mounted on *hobbies*, or small horses.

Purveyance for the king's dogs is also complained of in 14 Edw. III. c. i. These were probably the dogs necessary to spring the game for hawking, as well as his hounds. Though it may possibly surprize that this grievance should be felt, there is, in the *Notice de Diplomes*, published at Paris in the year 1765, an abridgement of some ancient French Records, which represent the great expence to the subject in providing for the king's hawks and dogs, p. 48 and 213. This collection, which is in Folio, was begun by Monsieur de Secouffes at the king's command, and is now continued by the Abbé de Foy, who promises a second volume. Carte's publication of the *Rolles Gascognes* seems to have given the first idea of this learned compilation.

I find likewise, in Sir Robert Atkins's account of Gloucestershire, that there is an entry in Domesday of the manor of Cheltenham being held under Edward the Confessor, by being obliged to provide 3000 loaves for the king's dogs, p. 232.

After

After this, follows a proclamation, which is divided into five articles. The second directs, that hundreds, wapentakes, and bailiwicks, which had been let to farm, and anciently parts of particular counties, should now, after a separation, be re-annexed; which I take notice of, as the dismembering for the convenience of the farmers of the crown lands might have been the occasion of some of those old slips of counties which are surrounded by others.

The 4th article directs, that no writ of *Nief* [k] shall issue out of chancery, but at the suit of those in whose names they shall be purchased, or unless the chancellor or his clerk are apprized that the said writs are sued with the knowledge and will of those who applied for them. This regulation seems to want explanation, and I apprehend the occasion of it to have been this. No one was entitled to a writ of *Nief*, but he on whose lands she was born, and so became a vassal. Some person probably about this time had attempted to get possession of a *Nief* which did not belong to him, and by abusing the process of law: the proclamation therefore directs, that the person suing the writ should be known at least to have a specious title to the *Nief* which he claimed, as otherwise a very

[k] A *Nief* was a woman born in vassalage; in Latin, she is called *Nativa*. It was one of the articles given in charge anciently, to inquire with regard to the offence of *Childewite*, or the begetting a bastard on the *nief* who belonged to another; and in a grant of K. John to the citizens of Lincoln, they are exempted from this fine, “*Concessimus, quod liberi sint de brustoll* (which I conceive to mean *brugstoll*, or toll for repairing “a bridge) *et childewite.*” Petyt Mss. vol. i. p. 11. Leirwit was also the fine imposed for corrupting the chastity of the *nief*. See Higden’s *Polychronicon*. Gale, vol. ii. p. 203. The Commons petition, in the twenty-first of Edward the Third, against a contrivance of the *niefs*, who, when they insisted upon being free, always contested the point in a county where they were not born, and consequently not known. Petitiones in Parl. vol. ii. p. 180.

short and tortious possession might have much altered the condition of the female vassal.

The 5th article deserves to be written in letters of gold over the door of every treasury in Europe, as it recites more money to have been raised for the war against Scotland, than had been expended; and therefore orders, that the surplus shall be equally divided amongst those who contributed to the tax.—*Vestigia pauca retrorsum.*

STATUTUM DE CIBARIIS UTENDIS,

10 Edw. III. Stat. iii. A. D. 1336.

THIS statute is a sumptuary law to restrain the expence of entertainments, though we do not suppose that luxury had made very great strides in the fourteenth century: this vice however is only comparative; and a house-keeper of the present times means very different in praying for *his daily bread*, from what that petition was intended to entreat at the time of the Conquest.

The statute recites great inconvenience to the more opulent by excess in eating, to which “*les gentz du [l] royalme font usez plus que nul part ailleurs;*” and likewise the ruin to those of less affluent fortunes, from an absurd endeavour to imitate this extravagance. It therefore ordains, that no one should be allowed either for his dinner or supper [*m*] above two courses, as also not above three dishes in each course, and it is likewise expressly declared, that *foufed meat* is to count as one of these dishes; certain feasts are however excepted, in which three courses are permitted. This law, in all probability, like most other sumptuary

[*l*] Fitz-Stephen, in his description of London during the time of Henry the Second, hath the following passage: “*Præterea est in Londoniâ supra ripam fluminis inter vina in navibus et cellis vinariis venalia, publica coquina; ibi quotidie pro tempore est invenire cibaria, fercula, assa, pista, frixa, elixa, pisces, carnes grossiores pauperibus, delictiores divitibus, venationum, avium, avicularium. Quantalibet militum vel peregrinorum infinitas intrârit urbem quâlibet diei vel noctis horâ, ne vel hi nimium jejurent, vel alii impransî exeant; qui se curare volunt molliter, acipenserem, vel Afram avem, vel attagenem Ionicum non quærant, appositis quæ ibi inveniuntur deliciis.*”

[*m*] Froissart mentions waiting upon the duke of Lancaster at five o'clock in the afternoon, when *he had supped*.

regulations, was never executed with any strictness: it serves however to shew our ancestors way of living, and perhaps we shall not suffer, in comparison, so much as is generally apprehended. We need not look further than into the bill of fare for a great feast or entertainment in those days, to see that the expence and gluttony were immoderate.

STATUTES

ii

STATUTES MADE AT WESTMINSTER.

11 Edw. III. Stat. iii. A. D. 1337.

THE Statute *De cibariis utendis* is followed by other laws made to restrain expence in drefs, and likewise to promote the confumption of our own manufactures. Trade at this time began to be more understood, and likewise to be confiderably extended, as Hakluyt^[n] mentions privileges granted, in the year 1330, to the inhabitants of *Blackney* in Norfolk, on account of their commerce with *Iceland*. The great towns in *Flanders* had long been enriched with the staple of our wool: the statute therefore directs, that if a merchant fhall export this commodity, he fhall be guilty of felony. At this time every feflion of parliament did not teem with new felonies; and therefore the legiflature muft have been highly fenfible of the great national detriment by the foreign staples, to have made the offence in the firft instance amount to a capital crime^[o]. The next chapter forbids any one to wear cloth manufactured out of the realm, except the king, qneen, or their children; and likewise permits the manufacturer to make the pieces as long or fhort as he choofes.

The 3d chapter orders, that no foreign cloth fhall be brought into the kingdom under the penalty of forfeiting the commodity, and the importer likewise is to be punifhed by indictment.

[n] Hakl. vol. i. p. 122. where Hakluyt mentions, that it is not above a fortnight's fail from Lynn to that ifland. Leland, in fpeaking of Hull, fays, "this towne was in time of Edward the Third, but a meane fifchar towne; but the firft great increafing was by paffing for fifche into Iceland, from whence they had the hole trade of flok-fifche into England, "as well as partly other fifche." Itin. vol. i. p. 41.

[o] Clergy is not indeed taken away by the ftatute.

The 4th chapter directs, that neither man nor *woman* [p], who cannot afford to spend 100l. a year, should wear furs, under penalty of forfeiting them [q]; they are likewise made liable to an indictment.

The 5th and last chapter grants privileges and immunities to the foreign manufacturer who will settle in this country; so that these statutes, which taken all together do not exceed forty lines, seem to contain a code of wise regulations, which have perhaps never since been rendered more perfect by any subsequent and explanatory law.

[p] This is perhaps the first instance in the Statute-book of an apprehension, that a *woman* is not included under the word *man*. The countess of Richmond was put into many commissions of the peace, and had many public offices. Whitelock, vol. i. p. 481. "Contra omnes *homines et feminas* warrantizabunt." Reg. Honor. de Richmond, p. 96. By the laws of Verona it is laid down as a general rule, that the mention of the male in a law shall include the female, "Quoniam sub autoritate *juris civilis* perniciosè quandoque erratur, statuimus quod in omnibus *statutis* *communitatis civitatis Veronæ* masculinum genus comprehendat *etiam* *femininum*, si illud de quo tractatur communiter se habeat ad *utrumque*. *Leges Municip. veron.* 1507, p. 63.

[q] We see by ancient portraits, that, before the manufactures of gold and silver lace, furs constituted the greatest finery in dress. The most costly, imported from the northern parts of Europe, were even used so early as the time of Henry the Second, as Giraldus Cambrensis mentions, that in his distresses he changed them for wooll, which answered the same purpose in warmth, though not in finery. *De rebus a se gestis*, c. iii.

STATUTES MADE AT WESTMINSTER,

14 Edw. III. A. D. 1340.

THE statutes now begin to appear in a new and more regular form; the titles [*r*] henceforward are almost always English, and the session of parliament is generally held at Westminster [*s*], whilst the preamble in every instance makes mention of the *concurrence of the Commons* [*t*].

The present *capitulary* consists of twenty-one chapters, the greater part of which relate to the amendment of the law. The 5th chapter recites great delays and inconvenience to suitors, from the judges of Westminster-Hall differing in opinion; it therefore directs, that, in every parliament, a prelate, two earls, and two barons, should be chosen, who should have power to send for the judges, and to give redress. This seems at present to be a very extraordinary regulation, as such prelates, earls, and barons, would probably be very incapable of deciding the points on which they were to sit as judges of appeal [*u*]. Perhaps, however, the legislature might think them the more proper for not having had a professional education, as it appears, by other parts of this statute, that the decisions in Westminster-Hall began now rather to turn on subtleties, than doing substantial justice to the parties [*w*]. The

[*r*] The body of the statutes continues, however, to be in the French language.

[*s*] As the commons now always constituted part of the legislature, accommodation was not easily procured in other towns.

[*t*] The present preamble speaks also of the attention necessary to the welfare *des petits, aussi bien que des grands*.

[*u*] The statute indeed permits them to consult with the chancellor, treasurer, and others of the privy council. Possibly this may be the origin of the appeal in matters of law to the House of Lords.

[*w*] Loisel (in his Dialogue of Advocates) remarks, that these subtleties were

The 6th and 18th chapters afford instances of this kind, “Item
 “est assentu que par misprison de clerc, en quecunque place que
 “ce soit, ne soit proces aneantiz ne discontinue par mesprendre,
 “en escrivant *un lettre, ou un sillable trop, ou trop poi*, mes si tot
 “que la chose soit aparçue, par challenge du partie, ou par
 autre manere, soit *bastivement* amende en dite forme sans donner
 “avantage au partie.”

It is remarkable, that there are frequently variations in the spelling even the same person's surname in much later reigns than Edward the Third's: thus Rastall's name (the editor of the Statutes) is sometimes written *Rastal*, and sometimes *Rastell*, which variations must have been printed under his own inspection. Thus likewise Fuller mentions, that the name of Villers was spelled fourteen different ways, in the deeds of that family[x].

“Ce desordre d'orthographe, regne dans les anciens monu-
 “mens d'Italie, d'Allemagne, d'Angleterre, et d'Espagne comme
 “dans ceux de France. Veut on maintenant savoir comment
 “les mots des langues vivantes sorties de la langue Latine s'ecar-
 “terent insensiblement et des ses sons naturels, et de son ortho-
 “graphe? Il n'en faut point chercher d'autre cause, que l'incon-
 “stance de cette orthographe[y].”—“Ces variations ne sont
 “point moins sensibles sur les medailles, et les monnoies[z].”

Pasquier informs us, that he had compared many manuscript copies of the Romant of the Rose, and that the spelling as well as language always varied according to the province of which the

were introduced into the French law about the same time; and that the ecclesiastical lawyers, who attended the popes at Avignon, were the occasion of this, “et c'est de la que nous avons appris *la chicane*, s'il m'est loisible
 “de parler ainsi.”

[x] Worthies of England, p. 51.

[y] Nouv. Tr. de Dipl. vol. iv. p. 492.

[z] Ibid. p. 501. See also the first article in the Glossary to Gawin Douglas.

transcriber was an inhabitant. He observes likewise, that they generally took the liberty of modernising what they copied [a].

But the strongest proof of the uncertainty of orthography in our language so late as the time of Edward the Sixth is mentioned by Sir John Pryse [b]: “*Jussis enim quatuor Anglicè*
“*scribendi peritissimis in varias partes secedere, et perbreve*
“*sententiam Anglicè, me dictante, excipere, nulli eorum prorsus*
“*cum alio per tres aut quatuor dictiones integras usque quaque*
“*convenit.*”

This difficulty with regard to altering process, or a record, is entirely peculiar to the law of England; and, carried to the absurd strictness [c] to which there was formerly a most blind adherence, hath occasioned the many statutes of *amendments*

[a] *Recherches de la France*, p. 681. Voltaire, in the work which he entitles *Questions sur l'Encyclopédie*, gives us the following letter of Francis the First, who is said to have been an encourager of learning:

“*Tout a steure ynfi que Je me volois mettre o lit, est arrivé Laval qui*
“*m'a aporté la ferteneté du levement siege.*” Article CHARLES IX.

Suetonius however (in his *Life of Octavianus*) contradicts an anecdote, that this emperor had the accuracy of orthography so much at heart, that he removed a governor of a province for having used *ixi* for *ipfi*.

[b] In his *Historiæ Brytanicæ Defensio*, p. 5.

“*And for there is so grete diversite,*

“*In Englishe and in writing our tonge,*

“*So praie I to God that none miswrite the,*” &c.

Chaucer, in *Troilus and Creseide*, addressing himself to his book.

The kings of France, who bore the name of Louis, signed *Loys* till the year 1514. See *Rymer*, vol. vi. part i. p. 81.

[c] What greatly contributed to this strictness was the instance of a judge being heavily fined for the altering of a record. What I allude to is the known story of a clock being set up in Westminster-Hall, which was paid for out of this fine: it was therefore (without meaning to pun) a very striking memento to the judges. Mr. *Blackstone* however observes, from the *Encyclopédie*, that no clocks were used till a century after this supposed fine. The clockmakers were not incorporated in England till the 7th of Charles the First. See *Stowe*, B. v. p. 237. Though there is

ments and *jeofails*. I do not mean by this to insinuate that records should be wantonly altered, but only where it does not materially affect the point in dispute, and is made under the control of the superior courts. As for the mistake of a letter merely, it is very extraordinary that this should have been fatal, as at this time not even the greatest clerks could spell with any accuracy; nay the same word, in the same period, is often written in a different manner throughout the body of ancient statutes. It is indeed absolutely impossible, that, before the use of printing, accuracy in spelling, which depends so much upon memory and extensive reading, could have been brought to any regular consistency or perfection.

This nicety in the setting forth legal proceedings is in many cases taken away by the statutes of *jeofails*, which do not extend to criminal proceedings[d]: by means of which many cri-

is an instrument in Rymer, entitled, *De Horologiorum artificio exercendo*, which secures proper protection to three workmen in this branch of business, who seem to have been natives of Delf. Rymer, vol. iii. part ii. p. 145. A. D. 1368, and 42 Edw. III.

Chaucer indeed makes mention of a clock,

“Well fikerer was his crowing in his loge,

“Than is a clock, or Abbey Horologe.”

Chaucer, in the *Tale of the Nun's Priest*. It appears, however, by other passages in this poet, that travellers at this time commonly determined the hour of the day by the length of the shadow.

[d] I must own I am not aware of any material or solid objection, which there would be to make these statutes extend to criminal proceedings: no one could have heard of the late application to the House of Lords in the case of *Luckup*, to reverse a judgement of the King's Bench for what is called *error*, but must have wished that there was such a power to amend. Mr. Blackstone, in his learned Commentaries on the Laws of England, expatiates with great liberality of sentiment against the affected nicety of the judges formerly with regard to amendments. He also cites from *Ignoramus* the fatal consequence of the most immaterial mistakes; “in nostrâ lege, unum comma evertit totum placitum,” vol. iii. p. 409.

minals

minals have escaped the punishment due to their crimes, to the great encouragement of other offenders, and to the disgrace of the law. Some judges have thought, from a *false compassion*, that it is their duty to find out such mistakes, by which the criminal may be acquitted. I have ventured to call this a false compassion, and am justified in thinking it so by the authority of Lord Chief Justice Hale, who was not only a most consummate lawyer, but is known to have been of a most remarkably humane disposition [e]. No man was more sensible of the duty incumbent upon every judge to be of counsel for the criminal; but what calls for such a duty, when the prisoner hath no compassionate or favourable circumstance, arising either from the proof of the prosecutor, or from his own defence? Is it not, on the other hand, the duty of the magistrate, *ne maleficia maneat impunita*?

The 18th chapter of this law likewise takes away another inconvenience arising from too great nicety in pleading; it recites, that demandants in pleas of land had been often delayed, because the tenants have vouched to warranty a dead man, against which voucher the demandants before this time might not be received to aver that the vouchee [f] was dead, to their great delay and mischief: remedy is therefore provided, &c.

I do not pretend to understand the ancient forms of pleading in real actions, sufficiently to explain why this averment could not be received; the statute however recites, that the law was so understood, which is not extraordinary, as it is a well-known story in Westminster-Hall, that a party in perfect

[e] See his History of the Pleas of the Crown, in which he says, these niceties are the disgrace of the law.

[f] It is in the original French improperly printed *vouchier*, instead of *vouchee*, the sense requires it should be so, and my manuscripts confirm this reading. The common translations therefore speak of the *vouchee* instead of the *voucher*, though they do not correct the mistake in the original.

health, who was hearing his cause, being killed by a pleader in a plea, the judges could not take notice that he was alive.

There are two other particulars in the 16th chapter of this statute, which I shall just take notice of. It relates to those persons before whom *nisi prius* may be granted, and says (amongst others) that it may be granted before the Lord Chief Baron, *if he is a man of the law*. This proves that even so late as the reign of Edward the Third, the barons of the Exchequer were not considered so much in the light of judges, as officers of the revenue. The second is, that it may be granted before the justices of either the King's Bench, Common Pleas, or *sworn serjeant of the king*. I cannot help therefore submitting a doubt, whether the practice of putting serjeants into the commission (who are not *King's Serjeants*) [g] is pursuing the direction of this part of the

[g] Every serjeant at law indeed becomes so in consequence of the king's writ directing him to take upon himself that dignity : but the words *sworn serjeant of the king* seem to import those serjeants only who are properly styled *King's Serjeants* : other serjeants are styled simply *Serjeants*. The word *serjeant* formerly signified a military rank (as indeed it does at present), which seems to have either preceded, or was only immediately inferior to, the order of Knighthood. By the ordinances of Lucca, they are also classed with commanders of fortresses : “ *Castellani et Sergentes cujuscunque Rochæ*” (or *fortress*), from the Italian word *Rocca*. *Statuta Civitatis Luccensis*, l. i. c. iv. Luccæ, 1539. Fol.

Philippe Mouskes, who was bishop of Tournay, and wrote a history of France in verse during the thirteenth century, places them between knights and common soldiers :

“ Manda Princes et Cavaliers,

“ Manda Sergans et Saudoiers.”

Inter Byz. Script. Venet. 1729.

In the *Affises de Jerusalem*, it is regulated how many, both knights and serjeants, shall be furnished by that district of the country in Asia, which had been conquered by the Christians in their crusades ; these amounted to 666 knights, and 5075 serjeants ; and, in the preface to Beaumanoir, mention is made of the “ *chevaliers es armes, et en loix*,” which seems

the law, though the objection may perhaps by many be considered

to answer to our serjeant at law. So likewise in the *Romant de la Rose*,

“ Qui veultu pour la roy defendre,

“ Quelque chevalerie emprendre,

“ Ou soit d'armes, ou soit de lectures,

“ Ou autres convenables cures.”

Hence the terms of Bathelor of Arts, Batchelor of Laws and Divinity, which originally signified an inferior degree of knighthood—*Bas-Chevalier*. Froissard likewise speaks of this distinction between military and law knights: “ Les deux chevaliers de armes, Monsieur de Clermont “ et l'autre le seigneur de Conflans; *le chevalier les Loix* Monsieur Simon “ de Buffy.” Livre i. ch. 177.

In the time of K. John the *Serviens Regis* was only an officer to execute criminal process: “ unde præceptum fuit Servienti Domini Regis “ quòd eum *quæreret* ” and afterwards, “ unde Serviens Domini Regis “ quæsitus, dixit quòd non *invenit* eum.” Proceedings before the coroner at Litchfield in the fifth year of K. John. Petyt Mss. vol. i. p. 113. The City Serjeants and Serjeants at Mace, originally only executed process, and the *Presidents a Mortier* in France were attended with the same officers for the like purpose, though it may have been since trusted with others.

The *coif*, which a serjeant at law continues to wear, was originally an iron plate or scull-cap, worn by knights. The word *Coif* is thus explained in a very learned Glossary, printed at the end of a new edition of the history of St. Lewis at Paris in 1761, from a manuscript lately discovered in the *French King's* library, and where this authority from the old romance of Gerard de Nevers is cited, “ Gerard tira “ l'espee hors de fourel; si assenne a celui sur *la coeffe d'acier*, un cop si “ grant, &c.” The etymology of the word *serjeant*, however, seems to import something low, or base, as I should conceive it to be compounded of the two words *Serf* and *Gents*.

“ Perche trovata havea la disonestà

“ Sua moglie, in braccio d'un suo *vil serjente*.”

Ariosto, canto xxxviii. st. 42.

Du Cange (in his Glossary *Mediæ et infimæ Græcitatibus*) gives us the word *Σεργενής*, citing *Anna Comnena* for it, the Greeks having adopted the

sidered as rather minute, after a different construction of this statute hath so long prevailed.

the term from the crusaders, which is an additional confirmation that this word is not to be derived from *serviens*, as is supposed by most etymologists. The Greek word would be otherwise Σερουενης, as the name *Valentinianus* is in Greek Ουαλεντιανος. If to this it be objected, that the changing the *v* consonant into *ov*, holds only in the beginning of words; then the alteration should be at least from the *v* consonant to *b*, and the word would then become Σεβενης; in the same manner that *Jovianus* and *Octavianus* become in Greek Ιοβιανος and Οκταβιανος.

In the explanation of the Saxon Coins, prefixed to Spelman's Life of *Ælfred*, it is indeed supposed that *Vespasianus*, becoming Οευσπασιανος, arises from the Greeks following the sound of the letter, and adopting the Saxon *ƿ*, which seems a very improbable conjecture, as the connexion between the Greeks and the inhabitants of the Northern parts of Germany is not a very obvious one. See Annotations on Tab. IV. N° 18 prefixed to *Ælfred's* Life.

The Realme and People of England shall not be subject
to the King or Kingdom of France.

14 Edw. III. Stat. v. A. D. 1340 [b].

THE conquests of Edward had not only thrown the kingdom of France into a general consternation, but had given a most prudent and politic alarm to the English, lest they should become dependent by an union with the conquered country. This *supposed* statute is in reality only a strong declaration from the king, that this apprehended consequence shall not ensue from his victories. It begins, "Le roi à tous ceux, as quieux
"cestes presentes lettres vendront, saluts," and concludes by
"cestes presentes lettres vendront, saluts," and concludes by
"en tesmoignance de quel chose nous avons mis nostre seal." This declaration is dated in the fourteenth year of his reign, and the first of his assuming the title of king of France [i].

I have

[b] Mr. Petyt hath transcribed, from the Rolls of Parliament, a statute of 8 Henry V. to the same purport. Petyt Mss. vol. Z. p. 117.

[i] The old French historians and chronicles allow, that Edward the Third's title to the kingdom of France was a good one, nor do they seem to feel much from the change of kings. It could hardly be conceived, that Henry the Eighth should have been the only king of England, who hath expressly given up this title to the kingdom of France by his own mouth. At a meeting between this king and Francis the First near *Ardres*, "il commença a parler, Je Henry Roy, il vouloit dire de
"France, et d'Angleterre, mais il laissa le titre, et dit au Roy, Je ne le
"mentrai point, puisque vous estes ici, car *Je mentirois*, et dit; Je Henry
"Roy d'Angleterre." Montf. Antiqu. de la Mon. Fr. t. iv. p. 197. Henry the Eighth, however, after this meeting, made some atonement for such a concession, by insisting that the king of France should be obliged, by treaty, to pay him annually a small quantity of salt, in acknowledgement, as it should seem, of his title and superiority. See

Rymer,

I have before said that this was a prudent and wise apprehension in the English, but it does not *necessarily* follow, that a less kingdom, by conquering a greater extent of territory, should in time become a province to the new acquisition, or that the seat of the empire should be fixed there, on account of its being more the centre of dominion; especially if the conquering country be an island, which will ever be a more secure place of residence for the king than the strongest fortifications on the continent. For this reason, the king of Denmark resides at Copenhagen, because it is situated in the island of Zeeland, which hath not many other inducements to fix the royal residence. It was some centuries before the emperors of Rome changed that capital for Constantinople, and that rather from a whim or disgust of Constantinople than because Constantinople was more central. These instances are mentioned to prove, that the consequence does not *follow of necessity*: it was most certainly wise in our ancestors, however, to make the earliest provisions, against so alarming and probable an event [k].

It

Rymer, vol. vi. part ii. 142. 21 Hen. VIII. where it appears, that Henry had neglected to insist upon his right, but then most expressly claims and obtains it.

Baluzius observes, that the Salick law, which was so much relied upon against the claim of Edward to the crown of France, was never heard of in that country, till the exclusion of the heir female by those constitutions decided at once the point in dispute between the two kingdoms. Then were first introduced these maxims: "Corona Franciæ de lanceâ nunquam cadit in colum."—"Lilia non nent." It is remarkable likewise, that it hath not been accurately settled, in what part of Germany these people lived, who were governed by the Salick law; as there is a river *Sala* both in upper and lower Germany. The most perfect edition of these ordinances is to be found in the second volume of Schilter's *Theaurus Antiquitatum Teutonicarum*. Ulmæ, 1727, 3 vol. Folio. They relate almost entirely to criminal offences.

[k] Instances indeed do not very frequently occur in history of the less territory, or kingdom, conquering the greater. It must be admitted that

It is insisted at the end of this declaration, that no argument or construction shall be drawn from the king's having altered the seal or arms of England. This was occasioned by Edward's having very imprudently put the *Flower de luces* [l] in the First quarter, as the blazoners term it, which is taken notice of by one of the ancient chroniclers as having deservedly given great offence. Notwithstanding this, Henry the Seventh gave the same preference to the arms of France, without any offence being taken at it by the English [m], which was the more extraordinary, as this king was in possession of but a small part of Edward's conquests. Edward the Sixth also bore the arms of France in the first and fourth quarters [n].

that *Alexander* does not seem to have had any thoughts of returning to Macedonia, and his directions to his successors on his death-bed chiefly related to the securing his new conquest of Persia: the Tartars also (though conquerors) have established the seat of their empire in the capital of China. Hobbes observes, with regard to such acquisitions, "that the kings march to and fro perpetually, as on a plank, sustained only in the middle; when one end rises, down goes the other." Works, p. 593. ed. 1750.

[l] A. D. 1339, Edward the Third went to Antwerp in his way to France, where having staid more than a year, he changed his arms according to the following lines:

"Rex sum regnorum bina ratione duorum,
 "Anglorum cerno me regem jure paterno,
 "Matris jure quidem Francorum Rex vocor idem,
 "Hinc est armorum variatio facta meorum."

Chron. Mon. de Pipwell in Agro Northampt.

Mss. Harl. N° 624. p. 32.

[m] Appendix to vol. i. of his History of the Garter, p. lxxii.

[n] Snelling.

A Confirmation of the Great Charter and other Statutes.

15 Edw. III. A. D. 1341.

THIS confirmation of the Charters contains some very particular and extraordinary additions, which seem to have been not sufficiently attended to by historians, or others.

I have before observed, in the comment on Magna Charta, that, in the early part of the English history, though long after Magna Charta was in force, the peers were often condemned and executed without being convicted by their own body, or indeed any regular course of trial whatsoever. The 2d chapter of this statute recites this, and expressly enacts, that, for the future, they shall be tried only by their peers [o]; as also that, if a lord of parliament choose to submit to any other method of trial, it should not prejudice the rights of the peerage. The 3d chapter recites, that clerks, peers, and other *freemen*, had been imprisoned without *indictment*, contrary to Magna Charta; it therefore directs, that the chancellor, treasurer, barons, and chancellor of the Exchequer, judges of both benches, steward and chamberlain of the household, keeper of the privy seal, treasurer of the wardrobe [p], comptroller of the household, together with

[o] There is an exception, if a peer is prosecuted as the *king's farmer*; which seems to imply it was at this time understood, that a lord of parliament had a right to be tried by his peers for a misdemeanor, or even when prosecuted in the court of Exchequer. The statute as printed is unintelligible, and one can only guess at the meaning.

[p] The treasurer of the wardrobe I conceive to be the same officer which is now styled the master of the wardrobe, at whose office some payments still continue to be made, though those who receive them have no connexion with this department. It appears by Fleta and others, that treaties and acts of state were frequently deposited in the *Wardrobe*, which then

with the preceptor [q] and chief officers of the duke of Cornwall, shall take an oath, upon entering into their office, to observe the Great Charters in every article. Though this is most strictly enjoined by the statute, I do not find that it ever became part of the oaths, which are taken by these officers upon their being appointed [r].

The 4th chapter enacts, that the king should remove these great officers [s] five or six days before every parliament, in order that those who had complaints to make, might not be deterred by dread of their power or influence, and that the king might with consent *des grantz*, which should be most near to him, substitute others in their places: this was indeed a most extraordinary regulation, and, I should think, was the chief pretence for the repeal which ensues. This most constitutional statute (at least the four first chapters of it) had scarcely passed, when Edward, by the advice of his privy council, issued a proclamation, which contains the following most hypocritical reasons for not allowing it to be an obligatory law: *Et*
 “ quia editioni perdicti statuti *pretensi* nunquam consensimus,
 “ sed premissis protestationibus de revocando dictum statutum si
 “ de facto procederet, *ad evitandum pericula quæ ex ipsius denega-*
 then contained a large district, in which the king's artisans lived; and there is a parish in the city still called *St. Andrew's Wardrobe* from this circumstance. This range of buildings was burnt in the fire of London; and it hath since been found better œconomy to purchase what is wanted from common tradesmen: it is probable, that many valuable records were then destroyed in this office.

[q] “ Ceux que sont chiefs deputez à demorer prez du fils le roy, duc de Cornouaille.”

[r] See the *Book of Oaths*, printed in 1649. The supposed *statute of repeal* which follows, is clearly no more than a *proclamation*, but might indeed occasion this omission in the form of oath to be administered to these officers.

[s] There is an exception of the Judges and barons of the Exchequer.

“ tione

“*tione tunc timebantur* provenire, cum dictum parliamentum aliàs
 “fuiſſet diſſolutum, et ſic ardua noſtra negotia fuiſſent, quod
 “abſit, veriſimiliter in ruinâ: *diſſimulavimus (ſicut oportuit)* et
 “dictum pretenſum ſtatutum ſigillari permiſimus hac vice:
 “videbatur dictis baronibus et peritis, quod, ex quo dictum ſtatu-
 “tum ex voluntate noſtrâ gratuitâ non proceſſit, nullum erat, et
 “quod nomen et vim ſtatuti habere non deberet; Ideo, &c.”

I ſhould imagine that no one can read theſe paſſages of the proclamation without feeling indignation, and thinking that its being publiſhed in the Statute-book as an act of parliament is a conſtitutional diſgrace. Under pretence of the ſame *prudent diſſimulation*, the moſt important and ſacred ſtatutes might for ever be evaded. I have before, in the character of Henry the Third, had occaſion to obſerve, that ſome of our kings, moſt celebrated for their conqueſts, had attempted to make the greateſt infringements upon the conſtitution. The preſent proclamation furniſhes a moſt ſtriking proof of this, and it is dated in the ſecond year after Edward had aſſumed the title of King of France.

18 Edw. III. Stat. ii. A. D. 1344.

THERE is a most singular recital in the preamble of this statute, if it is (according to Raftal) translated literally, viz. that the French king, “s’afforce tant come il poet à destruire “notre dit seigneur le roi, ses alliez [s], subgitz, terres et “lieus, [t] *et la lange d’Angleterre.*” The complaining that the king of France intends to destroy the English tongue, in the preamble to an English act of parliament speaking in the French language, seems to be one of the most extraordinary allegiations which were ever thrown into a statute. The law then expresses the intention of the parliament to support the king in the strongest manner during the war against France, as they clearly foresee [u] the destruction of England, if Edward does not immediately pass the sea; they exhort him likewise not to be diverted from this important purpose, neither by *letters, words, nor fair promises*, from which it should seem that the English already began to distrust themselves as *negotiators* [x]. The parliament not only gives this exhortation, but likewise grants two fifteenths payable by the *commonalty* of the realm, and two tenths

[s] This is the first mention of the word *ally*, which unfortunately we hear too much of in the more modern parts of the English history.

[t] In a figurative sense, *language* is used for nation sometimes, as in the following instance: “*Quot fraudum et machinationum generibus “lingua Walensium ad instar vulpium progenitores nostros et regnum “nostrum invaserit;*” and afterwards in the same record, “*captivatum “per homines lingue sue.*” Rot. Walliæ 11 Edw. I. m. 11. dorso. *Theatrum Criminalium*, vol. i. p. 5, et 6. Petyt Mss.

[u] The word *yvant* should be read *vyant*; a word vitiously spelt for *voyant*, or seeing.

[x] We do not hear of any complaint of the insufficiency of English negotiators till the pamphlets which swarmed after the peace of Utrecht, and during Sir Robert Walpole’s administration, when his brother, Mr.

tents by the *cities and boroughs*. From this it should seem, that the knights of shires, and the representatives of boroughs, were considered in a distinct light; the commonalty was perhaps originally bound by the assent of the knights of the shires, and the inhabitants of boroughs only by their own representatives. The clergy and lay-peers might possibly at this time likewise make two distinct independent bodies in the house of lords, as the preamble of a modern act of parliament always states the assent of the lords *Spiritual and Temporal*, though the lower house is comprehended under the general name of *Commons* in parliament assembled.

The 2d chapter of this statute directs, that two or three *des* Horace Walpole, was ambassador in France: one need say no more of these than that they were party pamphlets. The Abbé Mongon hath done justice to the memory of Lord Walpole, and says, that Cardinal Fleury was throughout his dupe, which is highly probable, as he was so far advanced in years. If we are to give credit likewise to the following lines, said to have been made by one of the ancient kings of France, this superiority in intrigue, by the English ambassadors, was always apprehended by those, with whom the treaty was to be concluded:

“Anglicus *Angelus** est, cui nunquam credere fas est:

“Cum tibi dicit ave, sicut ab hoste cave.”

See Lucy's *Cambrensis Eversus*, p. 289.

When two rival nations have had frequent wars, and consequently frequent treaties, it is natural that they should mutually upbraid each other with breaches of faith. Hence the Romans complained perpetually of the *Punica Fides*; and, if we had any Carthaginian historians, I should make little doubt, that we should find the same sort of charge against the Romans.

Most of our modern pamphlets likewise on points of trade are always recommending the example of the French; if one looks into the same sort of treatises printed on the other side of the water, the English are eternally proposed as examples to be followed in their policy, and encouragement of every kind of manufacture.

* i. e. *αγγελος*, or a messenger, and therefore applicable to an ambassador.

meultz vavetz des countees shall be appointed conservators of the peace, and that they shall have the king's commission to determine trespasses and felonies. As for the word *vavetz*, which is translated "men of the best reputation in the county," it is to be found in no glossary; nor does any term occur which bears any great affinity to it. Upon consulting my manuscripts of the statutes, however, I find the word used instead of it is *vaillantz*, which agrees with the translation. It is true, we generally use the word *valiant* as synonymous with the word *courageous*: in the old French writers, however, *valiant* (from *valere*) signifies only a man of worth, and *courageux* should be translated *angry* [y]. It is very extraordinary, that justices of the peace should have so much declined the trying of felonies; when it appears by this statute (to which they owe their institution) that it was the chief purpose for which they were appointed.

The 4th chapter repeals all commissions to assay weights and measures; which I should not have taken notice of, did it not recite the abuses of these powers, which have prevented the different statutes from Magna Charta downwards, relative to weights and measures, from being carried into execution.

[y] Thus, in the preamble of 1 Edw. III. Stat. i. "continuant leur mauvesté, moverent le corage de dit Roy Edouard;" *Froissart* uses the word *oultrageux*, for *courageous*: "*Wantaire Austarde, appert homme d'armes, et oultrageux.*" Vol. ii. ch. ccxviii.

THE OATH OF THE JUSTICES,

18 Edw. III. Stat. iv. A. D. 1344.

WHETHER it arose from the king's having been frequently absent during his wars with France, or whether from increase of riches [z], the law itself, the people of the country, and the magistrates who were to dispense justice to the subject, each wanted at this time much reformation. We find this from the recitals to many statutes of this reign, and likewise from that volume of the Year Books, which is entitled, *The Book of Assises*, where, by the articles to be enquired into by the judges of the King's Bench, it will appear, that there were abuses in the administration of justice (though, according to modern ideas, a high conception of it hath been formed), which are now happily not even heard of, much less are they necessary to be restrained and punished. [a].

These

[z] The sixth chapter of the statute last observed upon makes mention, for the first time, of the circulation of *gold coin*.

[a] “Ceux sont les articles que sont enquirés per enquest d'off. en
“*Bank le Roy*, fait à enquirer de homicides, larcens, arsours de meaf.
“ravisseurs des femmes, et de tous maner de felons et de felonies, et
“leur receptors, procurors, et maintainors, auxi bien de temps le roy le
“pere, come de temps le roy que ore est, eschapes de larons, &c.

“Item de ceux que l'owent misfours de battre les gentes de *court*, jurors
“d'enquests, ou aucuns auters homes, queux sont les bators, et ceux que
“les l'owent, &c.

“Item des endictors que *sont garner les enditées**, et *discoverent le coun-*
“*seil le roy*, et des justices, et de leur compaynons.

“Item de ceux que veignent forciblement en *court le roy counter assises*,
“en affreiance de la peas, que les jurors n'otent dire veritie.

* This explains the meaning of that part of a Grand-juror's oath, by which he promises not to *disclose the king's counsel*.

“Item

These articles of inquiry, which the Year Book fixes to the twenty-fifth year of this king's reign, shew the prevailing crimes at this time; and the oath of the judges, now regulated by parliament, explains what was objected to them in their dispensing of justice. The first material part of the oath is, that they shall not receive fee or present, if it is not meat or drink of a very small value; they then swear that they will not take robes from any one, except the king, nor give counsel or advice where the king is party [b]. The statute having so far considered them as officers

“Item de gardeins des prisons, qui, pur dred de penance, font les prisoners deven' provours, et appeller' lays gents pur covetise de gaine.

“Item de ceux que teignent gents à lour robes ou fées pur veritie extinger, et pur maintenir lour mauvaises emprises, &c.

“Item de conspirators, et confederators que soy ent'raliont par serement, covenant, ou par auter aliance, que chescun eidera et sustendr' autre emprise, soit il faux ou veritie; et que fauxement fait endict et acquit' gents, ou fauxement move ou meintein plées.

“Item de coroners, des chieffes constables des hundreds, que elizent gents de petit value, et espargnent lez bons pur lour don'; et dascun hundred qu'on assesse pur tiels articles a trouver a c s̄, ou a x mark, ou ils levent x li. a grand oppression de people.

“Item des gardeins de prisons que apprenent laies perones que sont en lour garde l'ettur' per cause de salvat' d'lour vie, en desturbament de la com' ley, que la justic' ne se peut faire sur eux come sur laies gents en decit d'el roy.

“Item des taxors, et quillors de xv^{mes}, que per eux et lour ministres parnent certains fées a lour clerks, hushers, et autres lour ministres, et pur faire acquit'.

“Item de tous servants, officers, et ministres le roy; Archevesques, Evesques, Dukes, Contez, Barons, et tous autres quecunque de lour trahisons, extorc' et greivances faits al' people le roy, et de lour donefons et grandsums prises et levies de people le roy, pur grandisment de lour seigniorages, ou en autre maner.” Le Livre des Assises, p. 138, 139.

[b] I suspect that this should be where the king *is not a party*, as, by the preceding part of the statute, the judges are to give their advice to the king

officers paid by the crown [c], then provides for the equal distribution of justice to the subject, by making it part of the oath, that they shall not regard any letter or message from the king [d], with relation to any point depending before them, which is likewise a provision of one of the most ancient of the Scotch statutes.

The necessity of a judge's taking this oath having been thus enjoined by the legislature, it was one of the articles of complaint against Richard the Second in the following reign [e], that he had made the judges and other great officers submit to oaths of a new form upon entering into their office, and that this ceremony was *in secret*. Notwithstanding this, the oath continues to be administered in private; the occasion of which I should imagine to arise from the judge being sworn on his knees before the chancellor; if this is improper, however, it should be banished from the private room, as well as the open court.

king when he shall have occasion for it, and which in certain cases they still continue to do.

[c] It appears by 20 Edw. III. ch. i. that the king at this time had increased the salaries of the judges.

[d] The king's interfering in any cause, by commands signified under his Great or Privy Seal, had before been forbidden by the eighth chapter of the second year of this king.

[e] Graft. p. 8.

THE STATUTE OF LABOURERS,

23 Edw. III. A. D. 1349.

THIS *supposed* [e] statute recites the great increase of wages occasioned by a plague, some labourers now taking advantage of the scarcity of hands to insist upon extravagant demands, and others choosing rather to beg and live in idleness than to earn their bread by labour. Besides the other calamitous circumstances which attend a pestilence, it is remarked by all historians [f], who have given an account of occurrences during this melancholy scene of desolation and distress, that the manners of the people from despair become abandoned beyond conception [g]: nor is this soon removed by the ceasing of the distemper: the statute therefore speaks the language, and introduces regulations, of severity.

By the first chapter, every person able in body, and under the age of sixty, not having means of maintaining himself, is bound to serve those, who shall be willing to employ him, at the wages which were usually given the six years preceding the plague; if

[e] No mention is made of the intervention of the commons, which must henceforward be looked upon as absolutely essential, whatever it might have been before. Besides this, it appears by Dugdale, that the parliament could not meet this year on account of the plague.

[f] Particularly Boccace, in his account of the plague at Florence, which gave occasion to his Decameron, and which seems to exceed the celebrated description of that at Athens by Thucydides. I do not by this mean that Thucydides's, being more particular with regard to the symptoms, may not make it more valuable to posterity, from the information which physicians may receive from it.

[g] Those religious sects, who suppose their state of salvation to be desperate, are, for the same reason, most remarkably wicked and abandoned.

the labourer refuses, and it is proved by two witnesses before the sheriff, bailiff, *lord* [b], or constable of the village where the refusal is given, he is to be committed to gaol, and continue there till he finds sureties for entering into service upon these terms.

By the 7th chapter, no one is to give alms to a beggar, who is able to labour, under penalty of imprisonment, “*Nemo sub colore pietatis, aut eleemosynæ quicquam donet, seu eos in, defidiâ fovere præsumat, ut sic compellantur pro vitæ necessariis laborare* [i].”

By the last chapter, some penalties, imposed by a preceding part of the law, are disposed of in a very unusual manner: they are not given to the informer [k], as in more modern times, to enforce the execution of a statute, but in aid of *dismes* and *quinzimes* granted to the king by the commons.

Whether the neglect of this statute arose from this improper distribution of the penalty, or more probably from the severity of the law, the parliament, two years afterwards, in the twenty-fifth of Edward the Third, attempted to carry it into more rigorous execution, and likewise added some new regulations, fixing the price of not only the wages of the

[b] The words of the statute are, “*vicecomiti, ballivo, domino, aut constabulario ville;*” which word *dominus*, I should conceive to mean lord of the manor.

[i] There is an ordinance of King John of France (Edward’s contemporary), that the clergy shall preach against this false charity of giving alms to those who are able to work. Ord. Royales, p. 5. Since the introduction of the Poor’s Laws, it is become still more unnecessary and perhaps improper to give to an English beggar; a foreigner, however, may still want our alms in this country. It is laid down (in the *Doctor and Student*) that an act of parliament to prohibit the giving of alms is void.

[k] The proportion of a penalty, which shall be given to an informer, seems to be now settled, viz. half; at first, however, it was commonly a fourth, and afterwards, by later statutes, a third, till it was fixed at the half: even this large proportion seldom hath its effect.

labourer, but almost every kind of artisan. Some of the particulars are curious, and are a good standard to settle the comparative value of money, which often throws great light upon the more ancient statutes.

The common labourer, in the hay-harvest, is only to have one penny a day, except a mower, who, if he works by the acre, is to have *5d. per acre*, or otherwise *5d. a day*. A reaper is to have, in time of corn-harvest, *2d.* the first week in August, and *3d.* till the end of the month [1]; he is likewise neither to ask meat, nor any other perquisite, or indulgence. The law also requires, that the labourers shall repair to the next town or village, carrying their scythe or sickle *openly* in their hands, and shall there be hired in some public place. This regulation of the statute, though in other respects disregarded, seems to have been the occasion of what is now often seen in country towns, when labourers want employment.

The 2d chapter directs, that no man in harvest (before settled to be in the month of August) shall leave the village in which he lived during the winter, except the inhabitants of Staffordshire, Derbyshire, Lancashire, Craven, the Marches of Wales, and Scotland. The occasion of which regulation is, that there are large tracks of mountain or moorland in all these counties and districts, where nothing can be raised but oats, which often are not ripe till October, and consequently, if the labourers

[1] No one conceives more highly of parliamentary powers; but this regulation depending upon the season seems to exceed even the omnipotence of the legislature. There is (in a miscellaneous collection belonging to the Society of Antiquaries) a certificate of the regulation of wages in the East Riding of Yorkshire for the year 1593. The reaper, by this order of the court of quarter sessions, is to have *5d. a day*; and the comparison may be there made on every article in the present statute. vol. ix. p. 18. In the eleventh of Richard the Second, the mariners complain that they are only paid *3d. per day*. Rolls of Parl. vol. iii. p. 253.

were not employed in more early harvests, they would be without any means of getting their livelihood during the months of August and September. For the same reason, the inhabitants of the *Pyrenees* come for six weeks into the southern provinces of France, and return in proper time for the reaping their own corn; as do the Savoyards to the neighbourhood of Rome [m].

As I have mentioned, that the wages allowed to labourers by this law shew the comparative value of money, I shall likewise refer the reader to the appendix of the third volume of Dr. Brady's History, where there is a very particular account of the pay of Edward the Third's army in the twentieth year of his reign. That of the Black Prince was 20 s. *per diem*: the sum total is 12,720 l. 2 s. and 9 d. for which an army and fleet of 31,294 men were to be paid and subsisted for sixteen months, which possibly may rather astonish a modern board of treasury, or contractor for Germany. There is likewise, in Sir Richard Cox's History of Ireland, an account of the salaries of most of the principal officers of the crown at this time, from which the same comparative value may be drawn. See also Mr. Petyt's Collectanea [n], where the establishment of the household in the second year of Edward the Second is stated.

[m] See Montaigne's Travels, lately published.

[n] Vol. i. p. 345, et seq.

OF THOSE THAT BE BORN BEYOND THE SEA,

25 Edw. III. Stat. ii. A. D. 1350.

THIS statute recites a doubt [*n*], whether children born of parents out of the king's allegiance should inherit lands in England; which question, it seems, had been before the parliament in the eighteenth year of this king's reign, but nothing had been decided. The statute first declares, that it is the law of the crown of England [*o*], and hath always been so, that the children of the king, born in any part of the world, have a right to inherit; and this, according to the observation made in the note below, is a strong argument to prove, that, in the case of a common subject, the law was apprehended to be otherwise. I should imagine, that this parliament (or the judges of the time), if they had been consulted whether Philippa of Hainault, queen of Edward the Third, *had been naturalized by her marriage*, would not have long hesitated about the answer.

[*n*] The French expression, in the original, is *en awere*, and not *en awerouft*; which is always used by Littleton, in his Tenures, to signify a *doubt*.

[*o*] This is always considered as part of the common law, and differs almost in every rule relating to it from the case of a subject. Thus a queen consort may make a will, may sue, or be sued, &c. Lord Coke, in his first Institute, p. 31. B. says, that in certain instances a wife shall not be endowed of her husband's estate, particularly if she be an alien: he excepts however the case of not only a queen of England, but also the wife of the king's brother, and gives for example the queen of Navarre, who was married to Edmond, brother of Edward the First; he likewise mentions that it was so resolved by all the judges of those times, who were assembled on that occasion.

After

After this declaration, the statute, having naturalized Henry son of John de Beaumont, Elizabeth, daughter of Guy de Bryan, and Giles, the son of Ralf Daubenye, gives a very extraordinary power to the king, of conferring the same benefit on *as many others* as he should please to name, and likewise enacts, that for the future all children born of parents (subjects of the king) should inherit, except those of mothers who shall pass the sea, without *leave of their husbands*; which last restriction I should conceive to have arisen from an instance of this sort in a family of consequence.

THE STATUTE OF TREASONS.

25 Edw. III. Stat. v. A. D. 1350.

I SHALL take a very extraordinary liberty with regard to the title of this statute, which I have altered from the *Statute of Purveyors* to that of the *Statute of Treasons*. It is true, that the first [p] chapter of this law, as well as the 16th, relates to purveyance: but the 2d great constitutional chapter, which hath defined what shall be deemed treason, hath certainly a right to give a title to this *capitulary*, as the first of Mary hath repealed all other laws, which relate to this offence.

Two years before this statute was enacted, the Commons petitioned that it may be defined what shall amount to treason, complaining that, by the prosecutions for this crime, forfeitures were increased, and the criminals lost their benefit of clergy [q]. To this petition of the Commons, the king answered shortly, that it will appear by the judgement, entered on record, what kind of treason the criminals suffered for; so that this constitutional law was with some difficulty extorted from the crown.

As the declarations made by this statute of what shall be deemed treason are generally known by not only lawyers, but even every one who hath read an English historian with any degree of attention, I should not have stated any of the particulars, did it not give occasion to some observations.

It begins by declaring, that it shall be treason to *compass* [r] or *imagine* the death of the king. There have been many comments

[p] It consists of twenty-three chapters.

[q] *Theatrum Criminalium*, vol. ii. p. 149. Petyt, Mss.

[r] "Fait *compasser*, ou imaginer, la mort notre seigneur le Roi." Is it not extraordinary, that the life of an Englishman, prosecuted by the crown,

ments upon these words *compass* and *imagine*; and I should with great deference think, that, notwithstanding the general excellence of this most important statute, the word *imagine* is not sufficiently explicit, at the same time that it is likewise too figurative to be made use of in describing this most capital of all criminal offences. The Lombards, indeed, by their old laws, make use of still more loose rhetorical expressions, "Si quis contra animam regis cogitaverit [s]." The *Fuero Jusgo*, in describing the offence of treason, includes those, *que trattaren [t] del morte del principe*; which is likewise a most vague expression, though the Spaniards were at that time a more free people than perhaps in any other part of Europe [u].

The compassing or imagining the death of the queen, described by the word *Madame sa compagne*, is likewise declared to be high treason. Upon this part of the law there have also

crown, should continue to depend upon the critical construction of two obsolete French words? The word *imagine* is used in the Psalms, ii. 1. in the same sense with *plot*: *Why do the heathen so furiously rage together? and why do the people IMAGINE a vain thing?*

[s] Some of the ancient English grants are still more loosely worded: "Omnes libertates et aquas circa *Hull*, quas cor cogitare poterit, aut oculis videre." Rymier, vol. ii. part ii. p. 183.

[t] The Royal Dictionary, published at Madrid in 1739, gives many different significations to this word, none of which comes up to the sense in which it seems to be used in this law, which is, *shall concern himself in, or plot the death of the king*. Chiunque offendesse, *machinasse*, *congiurasse contro la persona, i figli, o l'onore de Reali regnanti, o contro gli stati nostri*, *sara reo di lesa maestà in primo grado, se sia suddito, o forestiere.* Ordinances of the King of Sardinia, p. 523. Torino, 1723, Folio.

[u] Nath. Bacon says, that, in the time of the Saxons, an indictment for high treason against the king, ran *felonice*; if against the country, *proditione*: he would have obliged antiquaries much, as well as writers on the constitutional law of England, by printing these indictments at length.

been

been doubts, whether *sa* queen-dowager is included; I do not mean by this to say, that such doubts have not received a very satisfactory solution, but only that it might have been worded in this part with greater precision. The designation of the queen, by the words *Madame sa compagne*, seems to be singular; we find however the same expression in other laws of Europe [w], “Los hijos y *compaña* del rey han de ser bien tratados, y que
“nájie les haga furca, ni danno algun [x].”

It is next declared, that the counterfeiting of the king's great or privy seal [y] shall likewise be considered as high treason; which I should not have taken notice of, as this part of the law cannot be more clearly expressed, did not a writ, printed in the original French, at the end of some other statutes [z] of

[w] Affer, in his Life of Ælfred, mentions, that the Saxons never described the queen by the word *regina*, sed *tantum regis conjugem* appellabant. “Sous la premiere race, et quelquefois sous la 2de et la 3me, “les fils et les filles des Rois portoient le titre des Rois et des Reines. “Les princesses mariées à des Comtes, ou devenues religieuses, conser- “voient encore le titre des Reines. On disoit en Angleterre au meme “sens, *la Reine d'un tel Roi*. Cet usage cessa néanmoins vers le milieu “du 8me siecle. Les Reines d'Angleterre ne porterent plus ce nom, “mais celui d'*épouses de Rois*.” Nouv. Traité de Dipl. t. iv. p. 535.— See also Hickes's Gramm. Anglo-Sax. p. 148. In the lately printed Rolls of Parliament, Johan de Crumbwell speaks of a woman, called *Idoigne*, as *sa compagne*.

[x] Fuer Jusg. lib. i. p. 52. *The children and wife of the king are to be well treated and respected, and the law is to protect them from any injuries.* This law supposes the king to be dead.

[y] This being the great and privy seal of England, it was thought necessary to propose a statute in the fifth of James I. to make it equally capital with regard to those of Scotland. See Journals of the House of Lords, June 30, 1606. It is rather extraordinary that the necessity of this should have so long escaped the king's ministers, and both houses of parliament.

[z] Cay's Stat.

the

the same year, give us the intimation of a very great neglect in this part of the act, which in some measure seems to countenance an observation made by Carte, that no lawyer sat in this parliament, when this most constitutional statute became a law [a]. This writ mentions a claim made by the clergy, that a clerk, who was convicted of counterfeiting the great or privy seal, or the king's coin, should have this privilege of clergy, to which the king answers; "that he is too much pressed by business of the greatest importance to decide this point; but that, if any clerk should be convicted of this offence before the next session of parliament (in which he hopes it will be fully discussed), he shall not be executed, but delivered to the ordinary." It is therefore highly probable, that this point must have been before the legislature, and yet nothing is said with regard to the privilege of clergy. It might be impolitic, indeed, that this claim should have undergone a discussion in parliament at this time; but as the clergy had, in effect, established this privilege, the opportunity of taking it expressly away should not have been omitted.

The statute then proceeds to offences in counterfeiting or debasing the coin, which have been punished with death in all countries where a coinage hath been established [b]: as it is therefore

[a] Carte mentions this observation invidiously.

[b] It is made so by the antient Athenian laws, *εαν τις το νομισμα διαφθειρη, τον θανατον την ζημιαν ειναι*. Petit's Legg. Att. p. 40. and, by the Russian ordinances, the criminal is punished by being obliged to swallow the base metal in a state of fusion. (Strahlenbergh's Russia.) The first offender I find mention of, as having been remarkable at least for this crime, was an Alexander of Byzantium, who was the chief officer of the public treasury: he raised an immense and sudden fortune by clipping the coin in such a manner, that the difference could only appear by the weight. The Byzantines gave him the nick-name of *ψαλιδιον*, or the *file*, from his making so dextrous use of it. I do not find, however, that he was prosecuted, or reflected upon further than by this nick-name; and

therefore universally a capital crime, it is much to be lamented, that those kings who have debased the money of the state, and have then ordered it to pass at the sterling price, are not subject to a prosecution for this offence on their part [c].

The kings in some parts of Europe indeed used formerly to exact a tax from their subjects as a bribe for not thus abusing their prerogative of coinage. "Item concedimus quod red-
ditus nobis debitos *pro dictâ pecuniâ non mutandâ*, qui in dicto
"ducatu *monetarium* alias *foecagium* appellatur, amplius levare
"non faciemus." Charter of Lewis Hutin to the province of Normandy, Anno 1315 [d].

As treason is in all states considered as the greatest crime of which the subject can be guilty, I have looked into the laws of most countries in Europe on this head, which in general are much more loosely worded than the present statute, at the same time that the punishment is sometimes more severe by its tortures than can ever answer the great end for which executions become necessary [e]. If the criminal in his agonies
excites

Justinian made use of him as pay-master of the Roman army, where he continued to practise the same impositions. See Procopius de Bello Gothico, l. ii. c. i.

[c] Henry the Eighth is said to have taken this method of filling his coffers; and he was perpetually issuing proclamations under pretence of reforming the coinage. See Coll. of Procl. penes Ant. Soc. vol. i. To the great honour of the kings of England, this hath not been attempted for the last century; very recent instances are not however wanting in other parts of Europe. "Les Anglois toujours soigneux de la foi
"publique ont été de toutes les nations de l'Europe celles entre les
"mains de qui la monoye a moins souffert d'alterations." Differt. sur les Monoyes, by the Abbé Venuti. Bordeaux, 1754, 4^{to}. p. 158.

[d] See Bruffel on Fiefs, t. i. p. 215.

[e] It is impossible, that the Inquisition itself can make use of a greater variety of most exquisite torments in an execution than were practised in this country during the reign of K. Stephen. See the Saxon Chronicle,
A. D.

excites the pity of the spectator, the crime for which he suffers is forgotten, whilst the law and its ministers are considered as vindictive.

There seems to be one particular in which most of the ordinances where the government is in the hands of a king agree, viz. that it shall be high treason *to kill his counsellors*; which arises from this, that the pretence, in the conspirator, is generally to remove the minister, whilst the king himself is supposed to be blameless [*f*].

A. D. 1137. The most singular punishment which I remember to have met with is mentioned by Morryson in his account of Germany: "Neare Lindaw I did see a malefactor hanging in iron chains on the gallows, with a mastive dogge hanging on each side by the heeles, so as being nearly starved they might eat the flesh of the malefactor before himsele died by famine; and at Frankforde I did see the like punishment of a Jew." Part iii. p. 204. It is not extraordinary, as some of the executions in Germany are of so shocking and horrid a nature, that no one can be prevailed upon to accept the office, but he who by being the son of a hangman is obliged to be trained up, and take upon himself this necessary employment, p. 205. A murderer's head after execution is in Germany placed in the same coffin with the person murdered, and is buried at the same time. Ibid. To this day when an executioner is wanted in the Maritime counties of North Wales, the hangman is always procured from Cheshire, and paid at an extraordinary price.

[*f*] Sir Francis Holburne hath printed a reading on this statute, in the year 1681. Hobbes likewise (in his Dialogue between a Lawyer and a Philosopher) hath entered into an examination of this law, and hath even critically explained some of the expressions, as, *fait compasser*, which he supposes must be carrying the treason into execution *by the hands of others*. It appears by this Dialogue, that this very acute writer had considered most of the fundamental principles of the English law, and had read Sir Edward Coke's Institutes with great care and attention.

A STATUTE OF PROVISORS,

25 Edw. III. Stat. vi. A. D. 1350.

SIR HENRY SPELMAN gives this account of the meaning of the word *Provisor* in this statute, which is commonly used in the same sense with *Purveyor*, “*Provifores etiam dicuntur, “qui vel episcopatum, vel dignitatem aliam ecclesiasticam in “Romanâ curiâ sibi ambiebant de futuro, quod ex gratiâ expectativâ nuncuparunt, quia usque dum vacaret expectandum “effet-[g].”* As this statute is to be considered as a sort of manifesto against the court of Rome, the preamble is more full and laboured than that of any other law which hath yet occurred.

The resistance and opposition to the papal encroachments was not confined to England at this time; for we find, in Boulanvilliers [*b*], a petition from the French parliament to King John, that he would insist upon the privileges of his kingdom against Pope Boniface. Fortunately for this country, the successes of Edward had made the English nation so respected throughout Europe [*i*], that the provisions of this law were thoroughly

[*g*] The word *Provisor* might therefore be not improperly rendered a *provident looker-out*.

[*b*] Vol. iii. p. 72.

[*i*] The news of his victories had not only reached, but seem to have astonished, the inhabitants of Constantinople, as Laonicus Chalcocondylas, one

thoroughly carried into execution; whereas the humiliating adversities of the French made them less capable of asserting their national dignity and privileges against the papal impositions. England likewise, by its advantage of insular situation, was less subject to the papal power, which could only be enforced by the pope's employing the army of a catholic prince against the state which lay under his anathemas; whereas an invasion of England was impracticable from any other country but France, then much depressed. The other method which the pope hath of commanding obedience to his mandates is, by fomenting a rebellion against the excommunicated king in his own country. This likewise could as little be effected, Edward being at the height of popularity from the eclat of his victories; besides this, the parliament joined with him in resisting the papal encroachments from the strongest motives of interest, as by these means they secured their own presentations to ecclesiastical benefices, when they happened to be in lay hands.

Though the encroachments of the church of Rome are mentioned throughout this law in their proper light, yet the pope himself is treated with great respect, being styled *Le saint pere*, or Holy Father [k]. One of the titles therefore of this statute, viz. "the king and lords shall present unto benefices of their own, and not *the bishop of Rome*," hath most evidently not been taken from the parliament roll, but hath been added by a translator or editor since the Reformation.

one of the latest Byzantine historians, gives us an account of them. It is not unentertaining to observe, in this history, how imperfect such intelligence becomes, when received at such a distance from an accidental traveller. See Byz. Hist. Venet. 1729.

[k] The beginning of all the letters, from the kings of England to the pope, in the twelfth, thirteenth, and fourteenth century, is *Papæ Rex devota pedum oscula beatorum*.

What

What most deserves notice in this statute, is the explanation of the *congé d'essire*, upon the vacancy of a bishoprick. The statute supposes, that the *free election* in the chapters had been originally granted by the king's progenitors, upon condition that they should have first asked leave of the king to choose, and after the election also requested his assent [l]: which conditions having been neglected, it is declared to be reasonable that the thing should *return to its first nature*. Now, in the first place, this previous and subsequent assent of the king does not seem to be very reconcileable to what is stated to have been a *free election* [m], nor is there to be found in Rymer any instance of the kings of England interfering upon these occasions. The king and parliament were however determined to exclude the pope from nominating, and having assumed the right of supposing what they pleased to substantiate their own claims, the

[l] There is in Mr. Petyt's Mss. a statute of the third of Henry the Fifth, by which, in consequence of the popedom being disputed, it is directed that those bishops, who are chosen by any Cathedral Church, shall be confirmed by the Metropolitan, after he had received the king's writ for this purpose. Vol. Z. p. 90, et seq.

It appears, by Fitz-Stephen's Life of Thomas Becket, that Gilbert bishop of Hereford went so far, as to oppose the election of the Archbishop, and that all the bishops of England were summoned upon that occasion. There seems also to have been formerly a free election of the Knights of the Garter, as the votes, in the fourth year of Henry the Sixth, were equal between Sir John Falstaff and Sir John Ratcliff, when the duke of Bedford decided the election in favour of the former. Anstis's History of the Garter, vol. ii. p. 130.

[m] Whitelock compares the election of a Speaker of the House of Commons (at least according to the practice in his time) to the choice of a bishop by a *congé d'essire*, and says that, to save trouble, the king recommends a Speaker, whom the commons afterwards elect. Comm. on Parl. Writ, vol. i. p. 224. Sir Thomas Smith, likewise, in his Commonwealth of England, asserts, that the Speaker is appointed by the king, though accepted by the House, p. 38.

salutary

salutary and beneficial consequences attending the fiction have given a proper sanction to it.

This statute not having deterred sufficiently some of these *provisors*, who still solicited the pope for benefices, and appealed against the decisions of the king's courts, occasioned, two years afterward, the first statute of *Præmunire* [*n*], which is so called not from that word being used in the law, which is in *French*, and directs a *garnissement*, or warning of two months, before such provisor, or appellant can be punished [*o*]. The writ to the sheriff, founded upon this statute, however, being in Latin, gives notice of this warning by the word *præmunire* (a barbarous word used for *præmonere*), whence these laws have since been so styled. The punishment for not appearing after such warning is imprisonment, to be put out of the king's protection, which signifies that of the king's courts of justice, together with a forfeiture of lands and goods.

This first statute of *Præmunire*, in the twenty-seventh year of Edward the Third, contains eight chapters, the four last of which relate to Gascony wines, none of which, except the last, having been translated in the common editions of the statutes, seem to have been little attended to by lawyers. The 5th chapter enacts, that it shall be *felony*, if any English merchant shall engross or forestall wines in Gascony; nor may he at any rate purchase them of a *Gascon* by money to be paid in England, if the price exceeds what wine is usually sold for in Gascony. When Parliaments enact laws in order to lower the price of provisions [*p*], they generally make the regulations

[*n*] See Hobbes's Works, p. 631, et seq. Collier, in his Eccl. Hist. asserts, that the first statute of *Præmunire* is not to be found in the Tower, vol. i. p. 595. See also an expostulatory letter of Pope Martin, occasioned by these statutes, vol. i. p. 729.

[*o*] He is on *this warning* to surrender himself.

[*p*] Wines must be considered in the same light with provisions.

upon the *spur of the occasion*, as Lord Bacon expresses it, and with too warm a spirit of reformation. This sometimes is productive of statutes of most extraordinary severity (as the present most undoubtedly is), and this new felony must likewise have been committed in Gascony; it therefore seems to have escaped the legislature, that the offence could not have been tried by the jury of an English country [q].

The 7th chapter enacts, that no English merchant, or person employed by him, should be permitted to go into Gascony, but just before the vintage [r]; and that no Englishman shall even at that time purchase any wines, but in the towns of *Bayonne*, or *Bordeaux*, under the same penalties; which are, forfeiture of the wine, as also the other penalties consequential to a felony. The statute then proceeds to direct, that, if any one infringes these regulations, he is to be apprehended by the *seneschal* of *Gascony*, or the *constable* of *Bordeaux*, and sent *in vinculis* to the Tower of London. It need not be observed, that these provisions of the statute are of a very extraordinary nature as well as severity, and therefore by 37 Edw. III. ch. xvi. this law is repealed as far as relates to the punishing the offence as a felony. In all other respects this statute is again confirmed, with this addition, “that the seneschal and constable of Bordeaux shall “yearly transmit to England certificates against those who have “broken the law, together with the bodies of the offenders, who, “if they contradict the certificate, it is to be tried by a jury of “merchants who trade to those parts.” If the offender, however, is not sent together with the complaint, the certificate is to be returned into the King’s Bench, whence process of outlawry is to issue.

[q] This seems to be another confirmation of Carte’s assertion, that there were no lawyers in this parliament.

[r] Englishmen residing in Gascony to buy up the wine are, by 37 Edw. III. ch. xvi. called *cochours engleys*, viz. *liers in wait*.

In the forty-second year of Edward the Third, a law passed, which prohibits any Englishman from going into Gascony either during the vintage, or at any other time, in order to purchase wine.

In the following year the recital of a statute declares, that this absurd law was very profitable to the kingdom, but that the Black Prince complained heavily of a great decrease of duties in his dutchy of Aquitaine; the statute of the forty-second of Edward the Third therefore is suspended, till the effects of the subsequent law are known, the parliament declaring they will not absolutely repeal it.

There is also a particularity in this statute, which may possibly deserve notice, as it declares "that *no Englishman, Irishman, or Welshman*, shall infringe the regulations of it," of which very cautious and unnecessary enumeration, I do not remember to have met with any other instance.

I have stated these heads of the different statutes of this reign with regard to French wines, that any admirer of the legislation, or notions of liberty, in these times, may ask himself the question, whether a member of either house of parliament could possibly have proposed such regulations since the Revolution? We find, however, that these laws not only passed, but continued in force for many years; and, even when any of them is repealed, it is to increase the revenue of the *Black Prince* [s], without the least complaint or notice taken of the inconvenience or oppression to the English subject.

[s] The French Chronicles take notice, that the *Black Prince* was in infinite distress during his residence in Gascony, from living upon a too expensive establishment; and that the consequence of this was, his laying a most oppressive tax of *fouage* (or *hearth-money*) upon the Gascons. See also Montfaucon's *Antiq. de la Mon. Fr.* t. iii. p. 11. and Dugdale's *Monast.* vol. ii. p. 980. where *foagium* occurs in the same sense in a grant to a priory in Normandy.

STATUTUM DE STAPULIS,

27 Edw. III. Stat. ii. A. D. 1353.

THIS statute is a most complete code of laws for the regulation of the merchants who attended the staples of wool, now transferred from *Flanders* to *England*, and to give the most summary justice upon all contracts entered into during the continuance of these great marts. The compilers of the Parliamentary History suppose that the chief occasion of Edward's removing the staple from the Great Towns of *Flanders* to *Newcastle under Lyne*, *York*, *Bristol*, &c. arose from his being displeased with the *Flemmings*, for disappointing him in an intended alliance between his daughter and their young Earl, *Lewis*. Slight circumstances of this kind perhaps often occasion the greatest events in history, though they are generally accounted for from more deep and important causes; thus it hath been said, that we owe the famous navigation-act, the great foundation and support of our commerce, to a personal dispute between *St. John*, ambassador from the *Commonwealth*, and the *States of Holland*. *St. John*, from this pique, determined to propose to the English parliamentary regulations, which should prevent the Dutch from being the common carriers of Europe [1].

The different chapters of this law speak sufficiently for themselves, without needing any comment or observations; it may be remarked, however, that the preamble to this statute first styles the parliament the *King's Great Council*; and it should seem, that for most counties there was but one representative at this time,

[1] It appears, however, by the debates of the House of Commons, in 1620, that these regulations were at that time thought of. See a late publication in 8^{vo}, 1766.

instead

instead of the two which they send at present [u]. The words are these: "En bone deliberation ove prelates, ducs, counts, " barons, chivalers des countées (cest à scavoir, *un pour toute* " *la countée*), et des communes des citées et burghs de notre " realme."

[u] It hath been suggested to me, by a person of great erudition, since the first edition, that the county of Bedford, in the twenty-third of Edward the First, returned three members for that shire only, without including the members for any boroughs in that county.

OBSERVATIONS
ON THE STATUTE OF HERRINGS,

31 Edw. III. Stat. ii. A. D. 1357.

IT appears by Dugdale [*w*], that a parliament intervened between the twenty-eighth and thirty-first year of this king's reign; we have, however, no laws of this intermediate session in the Statute-book. The preceding statute having made a complete body of regulations with regard to the wool-staples, the legislature now takes under their consideration the state of the herring-fishery on the Eastern coast near Yarmouth [*x*], which at that time was one great branch of trade, not only because the country was then of the Roman-catholic persuasion, but because salted provision and fish were the winter's store for every one's house, the markets not being supplied with fresh meat as at present. The parliament undoubtedly intended to promote this fishery by regulations, which were supposed to be of a wise and beneficial nature; whoever reads them with attention, however, will wish that this statute was repealed, as indeed should most of the other ancient laws with relation to trade, as the principles of it were at this time but little understood.

[*w*] Summ. Parl.

[*x*] Sir Henry Spelman (in his *Icenia*) speaks thus of the state of the herring fishery at *Yarmouth*, in the reign of Q. Elizabeth: "Retia illic
"piscatoria Londinum ab *Jermutha*, sc. 100 mill. porriguntur: quod
"cùm in parlamento 35 Eliz. palàm audissem affirmatum, et ut certior
"fierem sciolum convenissem: respondit, compertum fuisse suffectura ea
"ad totum spatium inter *Jermutham* et *Belgiam* occupandum, dum ab
"unâ navi ad alteram (piscatorum more) jungerentur." Reliq. Spelm.
p. 155. The petitions in parliament about this time make mention of a great herring mart established at *Scone*. See vol. ii.

By

By way of proving what I have here ventured to suggest, I will only mention two of the new provisions in a sort of explanatory act which follows. The first is, that no inhabitant of the county of Norfolk shall buy nets, hooks, nor other tackle necessary for fishing, except the owners, masters, or mariners, who use that craft, under pain of imprisonment, and being fined at the king's will. The other provision is, that the chancellor, treasurer, and the king's privy council, may make what regulations they shall please with regard to the price of salted fish.

The thirty-fifth of Edward the Third, which likewise relates to herrings, recites, "that they were sold at a most unreasonable price, occasioned (as the statute says) by many merchants [y], as well labourers as servants, coming to the fairs, and every one by malice and envy encreasing the price upon his competitor, so that if one bids forty shillings, another offers ten shillings more, and so every one surmounteth the other in bargaining."

It is scarcely to be conceived, that a statute, which proceeds upon such recitals, should have continued so many centuries unrepealed.

[y] The word *merchant* in the original is translated by the same word in English: it now bears a much more confined sense than it did at the time of making this statute.

STATUTES MADE AT WESTMINSTER,

34 Edw. III. A. D. 1360.

THESE statutes are a *capitulary*, consisting of twenty-two chapters; and I should not have made any observations upon them, was it not for the opportunity of fixing the signification of two words used in the first and last chapters of the law.

The statute directs, that in every county in England there shall be appointed, for keeping the peace, “*un seigneur, et avesque*” “*lui troits ou quatre de mult vavetz [z] du countee ensemblement ove ascuns fages de la ley.*” This is translated, “there shall be *one lord, &c.*” Now the word *seigneur* by no means signifies a *lord* who is a *peer of parliament*, as it is generally understood; of this we had an instance in the preceding law, where the owner of a fishing vessel is styled *seigneur [a]*; and in the present statute it cannot be thus rendered, as there were not at this time a sufficient number of peers to furnish a justice of peace for each county. The common sense however in which this word is understood seems to have led Sir Edward Coke [b] into a mistake, when he asserts, that the *High Steward*, at the trial of a peer, must *necessarily* be a lord of parliament. I have looked into the authorities from the

[z] *Vavetz* should be read *vaillantz*, as I have before observed on the 18 Edw. III. Stat. iii. and my manuscripts of the statutes confirm this alteration.

[a] So, by 37 Edw. III. ch. xix. which punishes the concealing of a hawk with two years imprisonment, the owner is styled *seigneur*.

[b] Inst. iv. p. 58. Mr. Petyt hath copied a treatise upon the office of the High Steward of England from a manuscript in the Cotton library (Vespasian B. vii. fo. 99. B.), which he says “*is dangerous to be printed.*” Pet. Mss. vol. xix. p. 293.

Year

Year Books, cited in proof of this position, which by no means warrant what he asserts, at least in the extent he hath advanced it. As for the case in 1 Hen. IV [c], there is not a word in it which proves the necessity of this great officer's being a lord of parliament; and as for the second authority, viz. 13 Hen. VIII [d], the words used in the Year Book are these: "Nota
 " quand un *seigneur de parlement* ferra arrain de treason, ou fe-
 " lony, le roy per ces lettres patentes fera un grand et sage
 " seigneur [e] d'estre le grand seneschal d'Angleterre;" which certainly imports nothing further than that he shall be a man of consequence [f] any more than the word *seigneur* does in the present statute; and we find, that, when a peer is mentioned in the above-cited passage from the Year Book, he is styled *Seigneur de parlement*.

The last chapter relates to the claiming of a stray hawk, and directs, that it shall be carried to the sheriff of the county, who is to proclaim it in all the principal towns (*les bonnes villes*) and to keep the falcon for four months; if no owner appears within this time, it becomes the property of the sheriff, upon condition that he pays a satisfaction to the person who brought the hawk, *fil soit simple-homme*: but if a gentleman (*gentil-homme*) claims it after the four months are expired, the sheriff is still to restore the hawk, upon being paid the charges of keeping it.

[c] Term. Mich. p. 1. By this case, however, it appears, that the high steward is to ask the peers their verdict, *en leur conscience*; from which it should seem, that the answer originally was *upon my conscience*, and not *upon my honour*.

[d] P. 1. Term. Pasch.

[e] The addition of *de parlement* is not here repeated.

[f] The word *seigneur* is derived from *senior*, age formerly giving the only rank and precedence.

"Credebant hoc grande nefas, et morte piandum,

"Si juvenis vetulo non affurrexerit." JUVENAL.

Thou shalt rise up before the hoary head. Lev. xix. 32.

This

This distinction, used between the *simple-homme* and the *gentil-homme*, seems to explain the meaning of the word *gentleman*, which is used in so vague a sense at present [g]. I should conjecture, that the *simple-homme* is *John* or *Thomas* [b], who hath no surname; and, in contradistinction, he who hath a *surname* or *family name*, from the word *gens* [i], is styled *gentil-homme*.

[g] In an action brought on this statute, the meaning of the word must be settled; as that of the word *Esquire* must likewise be, on some of the game-laws. The word *Gentilhomme*, though at first applied to persons of the greatest rank and consequence, from its being afterwards indiscriminately used in addressing any one, became by the time of Francis the First of France, almost a term of offence, as *Brantome* informs us, that his uncle *Monsieur de la Chataigneraye* resented this appellation from the princess *de la Roche sur Yon*.—On her complaining to the king of some expressions which *Chataigneraye* had made use of; Francis the First said she must thank herself for having addressed him so improperly. *Brant.* t. i. p. 375. ed. 1666. Sir Thomas Smith (in his *Commonwealth*) distinguishes the English below the rank of *Esquire*, into *Gentlemen*, *Yeomen*, and *rascals*, ch. 21. London, 1612, 4^{to}. In another place he uses the word *rascallity* in the above sense.

[b] Surnames are of no great antiquity in this country, nor are many of the common people in Wales to this day so distinguished. So *Ménage*, in his *Dictionary*, informs us, that the peasants in *Languedoc* are called by their own Christian name, joined to that of their father, as *Pierre de Guillaume*. In the time of Henry the First, when that king would have married an heiress of the great family of *Fitzhammon* to his base son *Robert*, she replied in the verses of *Robert of Gloucester*:

“It were to me a great shame

“To have a Lord withouten his twa name.”

Remains concerning Britayne, p. 92. London, 1629, 4^{to}.

[i] The word *gens* sometimes signifies *family*. *Hickes* (in his *Dissertatio Epistolaris*) observes that neither *William the Conqueror* nor *William Rufus* had any *nomen gentile*, which he expresses his surprize at, because the ancient kings of the northern parts of Europe were so distinguished. *Thef.* vol. ii. p. 27.

STATUTES MADE AT WESTMINSTER,

36 Edw. III. A. D. 1362.

THIS *capitulary* consists of fifteen chapters, which have little connexion with each other. We have often heard before of the grievance of purveyance[k]; and it is almost from year to year the subject of parliamentary regulations, whilst, notwithstanding the repeated interposition of the legislature, it continues to be still matter of complaint. The device of making it more palatable to the subject, by the 2d chapter of this law, is a most extraordinary one, viz. “*que le beignous nome de purveyor soit change, en nom d’achetour,*” which I shall render, “that the hateful name of *purveyor*, shall be changed to that of *acator* [l].”

This

[k] It appears by 7 Rich. II. ch. viii. that purveyance was not only insisted upon by the King, but also by many of the great Lords within certain districts. There is a proclamation of the tenth of March 13 Hen. VIII. which orders, under certain penalties, all persons, as well spiritual as temporal, in the city of London to put their empty hogsheds before their doors, that the king’s purveyors may purchase them at their own price. See Coll. Procl. penes Soc. Ant. vol. i. p. 19.

[l] This word is derived from *acheter*, to buy; and there is an office of *acater* still subsisting in the king’s kitchen. There is likewise the Italian verb of *accattare*, which is still nearer to the word *acator*.

“Men Dio offende, et men biasimo *accatta*.”

Dante, Inferno, canto 11.

The *Crusca* Dictionary renders this word, *mutuari*, *mendicare*, *invenire*; in the above passage, however, it plainly signifies to gain, and may therefore also be translated to buy, or purchase.

“Algate he waitid so in his *acate*,

“That he was ay before and in good state.”

Chaucer, in his Character of the Manciple.

We still indeed use the verb to *cater* in the same sense with to provide.

P p

There

This conceit of remedying an oppression, merely by giving it another appellation, seems rather unworthy a legislature, yet the change of a name may perhaps sometimes have its effect; as, if the taxes, which are at present called the *king's*, were styled those of the *public* (for whose benefit they are in reality collected), they might possibly be more chearfully paid; or at least it might be more easy to convict in offences against the laws of the customs and excise, which are seldom at present trusted to a common jury, who are not struck with the remote (though certain) consequence of an increase of taxes, by improper favour being shewn to defendants.

The last chapter of this law recites, that great mischiefs have arisen, “because the laws, customs, and *Statutes* of this realm are “not commonly known, and because they are pleaded, declared “upon, and decided, in the French language, which is much “unknown in this kingdom, so that the parties to suits do not “know what is said either for them or against them by their “serjeants and pleaders;” and likewise because the king, the nobles, and others who have *travelled in diverse regions and countries*, have observed that they are *better governed by the laws being in their own tongue*: the statute therefore enacts, that all pleas shall be in English, and that they shall be entered on record in Latin [m]. Selden

There is in Carte's *Rolles Gascognes*, vol. ii. p. 87. the title of an order in the following year (viz. 1363): “*De carpentariis capiendis pro operationibus apud Calesiam;*” and then follows, “*ibidem recitatur statutum contra provisores, et horribile eorum nomen permutatur in nomen d'acheteurs;*” which shews, that this change of the name was considered as the most material part of this statute.

[m] Whitelock asserts, that no mention is made in the parliamentary roll of the necessity of the record's being made up in Latin. *Comm. Parl. Writ.* vol. i. p. 345.

The law Latin as well as French was held in the highest ridicule as soon as printing became general, when the well known play of *Ignoramus* appeared in the reign of James the First.

Beaumont

Selden says, that this statute took its rise from an inconvenience rather supposed than felt; for though some kind of knowledge of law-terms may be increased thereby, yet, unless the science is professionally studied, "it will breed nothing but notions and overweening conceits, which often engage men in law-suits to their great loss;" he adds, however, "that thus in part the reproach of Normandy rolled away, like that of the Israelites at Mount Gilgal." But, with proper deference to so great an authority, few such law-suits have ever been occasioned by what he apprehends; and it is not only a wise law from the reasons mentioned in the preamble, but we find that the legislature hath carried this alteration still further, by directing that the pleadings shall be inrolled in English; there is also an ordinance of the *Commonwealth's* [n], that all the reporters shall be translated from the old French into the English language [o].

Beaumont likewise, who was the son of a judge, and educated in the Temple, speaks thus of the law Latin in one of his plays!

"May they know no language but that gibberish, the prattle to their parcels, unless it be the *Gothic Latin*, they write in their bonds!"

[n] See also in the Petyt Mss. a speech of Sir Bulstrode Whitlock's, made in the House of Commons on occasion of the bill for translating the Law Reporters into English, by which it was intended to adopt the Ordinances of the *Commonwealth* for that purpose. Vol. E. p. 202. et seq.

[o] James the First, in his Speech from the throne to parliament in 1609, recommends, that the books of the common law be written in the mother-tongue, that the people might know what to obey, and that the lawyers in law, like popish priests in the gospel, might not keep the people in ignorance. Wilson's Life of James the First, p. 47. I should imagine, that this recommendation arose from the king's inclination to sit as a judge in the king's Bench, which Sir Edward Coke objected to, and probably, amongst other reasons, because his majesty would not understand the law French of the reporters.

This statute [p] does not want the approbation of many others who had occasion to consider it, and particularly of Raftal, who, in his Preface to the Abridgement of the Statutes, highly commends it [q]. Voltaire, in his additions to the *Histoire Universelle*, speaks thus of this law, and others to the same purport: “Rodolphe de Hapsburgh avoit ordonné dans l’Allemagne, “qu’on plaïdat, et qu’on rendit les arrêts dans la langue du “pays. Alphonse le sage en Castille établit le même usage. “Edouard le 3^me en fit le même en Angleterre. Enfin François “Premier ordonna, qu’en France ceux, qui avoient le malheur “de plaider, pussent lire *leur ruine dans leur propre langue* [r].”

I shall

[p] The parliamentary proceedings however after this statute, and even to the twenty-eighth of Henry the Sixth, continue to be in French. In Mr. Petyt’s Manuscript collection of records (which he entitles *Theatrum Criminalium*) there is a very long deposition of one *Wodestock*, in the English language, taken at Calais in the twenty-first year of Richard the Second, the English and orthography of which are surprizingly pure for the time; it is however preceded and followed by parliamentary proceedings in law French. *Theatr. Crim.* vol. iii. p. 296, et seq.—I shall here give a short specimen of the English:

“Alsoe that I took my Lorde’s letters of his messages, and opened “hem ageyns his leve, I knowleche that I did evyl, wherefore I put me “lowly in his grace.”—

See also the fourth volume of the same collection, p. 74, et seq. when the parliamentary proceedings begin to be in the English language.

[q] This Abridgement of the Statutes, printed in 1517, is now very scarce; the whole Preface may however be seen in Ames’s *History of Printing*, p. 142, et seq.

[r] Denina, in his *Dissertation, Sopra le vicende della letteratura* (printed at Glasgow in 1763), says, that Francis the First’s having made this alteration arose from the French word *debouter* having been translated into the law Latin of that time by the word *debotare*. In a tract however written by John Cook, Chief Justice of Munster (printed in 1652), it is asserted, that Francis the First procured a large subsidy from his subjects for

I shall make no apology for this citation from Voltaire, though many think that he writes only to amuse, without any authority for what he advances [s]. The lately published letters of Fabricius, who was secretary to Charles the Twelfth of Sweden at Bender, shew, that what was looked upon as an entertaining romance consists of the most authentic facts. I have often heard the same objection to Mr. Hume's History of England; and, as it should seem, with as little foundation. Both these masterly writers not only instruct, but entertain the reader; and, from what cause I know not, we are always diffident of what pleases. On the contrary, we give implicit credit to a dull writer, who makes a perpetual parade of authorities which he does not understand, and from which he is incapable of drawing the proper inference.

There were four other parliaments held during this reign, in each of which there are some few statutes, but none of them need illustration, or throw any light upon either the law, the history, or antiquities of this country. In the year 1376, an act of indemnity and general pardon [t] passed, the reason for which (as set forth in the preamble) is, that the king had now reigned for half a century, and that there was to be a general *Jubilee* [u] throughout

this ordinance. This king of France is said not only to have encouraged learning, but to have been himself very knowing, and conversant in most branches of literature. Jortin's Life of Erasmus, vol. i. p. 86.

[s] I am happy to find, that the learned and most ingenious author of the lately published History of English Poetry entertains the same opinion of Voltaire, and no one hath looked deeper into original authorities.

[t] The only person excepted is the famous William of Wickham.

[u] I have been informed, that, when a man and his wife have been married in Germany fifty years, there is a sort of second marriage celebrated with the greatest festivity; as also that, in Holland, after a man
and

throughout the land. May there be occasion for such an act in the next century!

Edward died full of years and glory; though the ascendancy which Alice Perrers [x] gained over him whilst in his second infancy somewhat clouded the latter part of his life, which should have closed with an evening more answerable to its full meridian lustre. I shall not however consider either his virtues or his failings any further than they affect his character as a legislator. I have already, in some of the statutes of his reign, observed, that they were oppressive; and the frequent confirmations of the *charters*, particularly in the four last parliaments, shew that he had a constant inclination to break through them, whenever a convenient opportunity offered [y]. He will, notwithstanding

and his wife have been married twenty-five years, there is a solemnity which is called a *silver marriage*; after fifty, it is dignified with the name of a *golden* one.

[x] Daniel asserts, the influence of Alice Perrers was so great, that she used to sit on the bench with the judges in Westminster-Hall, when she happened to interest herself in a cause. Dan. p. 72. And it appears, by an instrument in Rymer, entitled, *De nave vocatâ la Alice*, that the same flattering attentions were shewn to her, as to the more modern *Pompadour*. Vol. iii. part iii. p. 47. 50 Edw. III. See also Mr. Petyt's *Theatrum Criminalium*, vol. ii. p. 188. where the whole proceedings in parliament against *Alice Perrers* are stated; as also a writ of Edward the Third, reciting that many women had been guilty of *maintenance* in causes, and particularly forbidding Alice Perrers to interfere in such matters, under no less a punishment than that of banishment.

There is also, in the same Collection of Manuscripts, a petition of Robert Pikerell, exhibited to the king in parliament the second year of Richard the Second; by which he complains that Alice Perrers had retained all the advocates in Westminster-Hall, so that he could have no advice: "si il ne donneroit si grande somme d'or, qu'il ne poit attainer." Vol. xxx. p. 79.

[y] His not allowing the statute of the fourteenth year of his reign to

standing this, for ever deserve to be venerated by posterity for the statute of *Provisors*, by which the seeds were sown of that freedom and independency in the church of England, which prepared the minds of men for the Reformation[*z*]. Whatever may have first contributed to this may justly claim our warmest gratitude; though the dread of the papal anathemas is now happily so far removed, that we can scarcely conceive any free people could have submitted to such encroachments, and national indignities.

to be obligatory (already observed upon) should not likewise be here forgotten.

[*z*] In the last year of this king's reign, the Commons represent "que Dieu a commis ses oweles à notre seint pere le Pape, a *pasturer*, et non *pas a tounder*." See the lately printed *Petitiones in Parlamento*, vol. i. p. 338.

STATUTES MADE AT WESTMINSTER,

2 Rich. II. A. D. 1377 [a].

RICHARD was but eleven years old when he became king of England on the death of his grand-father. The first capitulary, however, contains more good regulations than were naturally to be expected, from the confusion which attends the first parliament [b] of a minor king and which we are now happily delivered from, by an established regency [c].

[a] This parliament was called the *Good Parliament*. Stow's Chron. p. 280.

[b] We find in Rymer the names of twelve counsellors who were to assist the treasurer and chancellor the day after he came to the throne: this amounts to no more, however, than the appointment of a new privy council, which is usual upon every king's accession.

[c] The child of Vazanes was crowned king whilst in his mother's womb, the crown being applied to it. Fuller's Ch. Hist. p. 141. It is very extraordinary, that in no country (where the government by an hereditary monarch prevails) it should have been settled, as a general regulation, at what age an infant king should be considered as a major. There is, in the *Nouveau Traité de Diplomatie*, an engraving of an ordinance of Charles the Fifth, which is entitled "Ordonnance de la Majorité de nos Rois a quatorze ans." This ordinance relates indeed to the education of the royal children; but I do not find any declaration of the age at which they are to become majors. *Nouv. Tr. de Dipl.* t. vi. p. 46.

Solomon is said to have been but nineteen, when he made his famous decision between the two mothers. A Roman consul could not regularly be a candidate for the office till he was forty-three years of age. Minorities of their kings are denounced by Isaiah, to complete the national calamities of the Jews. *And I will give children to be their princes, and babes shall rule over them; and the people shall be oppressed*, Isaiah iii. 4, 5. If we may believe, however, *Regnier*, the *Lucilius* of France,

— "les roys, et les Dieux ne sont jamais des enfans." Sat. I.

It

It should seem, that a king of England hath constitutionally a power of appointing a regent by his will; though the successor, when a minor of but six months old, is said to have no imbecility *in the eye of the law*, and is as complete a sovereign as when of the most mature age[d]. From this an artificial argument may be drawn, that he cannot want or receive a guardian; and yet, if such an appointment is necessary, the parent seems to have a natural right to nominate the person to be intrusted with the education of the royal minor, who thence also becomes responsible for his acts.

Henry the Fifth, whilst on his death-bed, called in some of his principal officers, after which he made a hasty verbal appointment of the duke of Gloucester to be regent of England, and the duke of Bedford regent of France[e]. This was however immediately set aside by the parliament, on the accession of Henry the Sixth; and the duke of Bedford was nominated protector of England, as being the king's elder uncle[f]. Afterwards, in the[g] eighth year of the same king, we find an appointment of the duke of Gloucester to be protector of England, by writ of privy seal merely, without the intervention of parliament.

[d] Mr. Folkes observes, that there is no difference between the representation of Henry the Sixth on his coins, when he was only nine months old, and in the last year of his reign. He attributes this not entirely to the unskilfulness of those who were employed at the mint, but conceives that it was meant to inculcate the political and constitutional principle that the kings of England can never be in a state of minority. See *Treatise on English Coins*, p. 9.

[e] Carte, vol. ii. p. 642.

[f] Rymer, A. D. 1422. Sir Edward Coke hath a particular, but short chapter in his 4th Institute, *On the Protector of England*, which he concludes by saying, "it is the surest way to have the authority of Parliament."

[g] Rymer, vol. iv. part iv. p. 160.

The next provision for a minority in the crown was by 25 Hen. VIII. ch. xxii. by which it is enacted, "that, if the crown shall descend to a minor king under eighteen years, or a minor queen under *sixteen* [b], their mother shall be the guardian, together with such counsellors as the king shall nominate by his will." From this it may possibly be argued, that a king of England hath not the power of appointing a guardian without the concurrence of parliament; but the occasion of Henry the Eighth's having recourse to this sanction probably arose from the parliament's having set aside the hasty death-bed appointment of Henry the Fifth, which likewise broke in upon the rights of the duke of Bedford, as being the elder uncle to Henry the Sixth. The difficulty of settling this important point of constitutional law arises from the precedents being few in number [i]; the last instance in the year 1422 hath certainly the intervention of parliament, and the appointment by Henry the Fifth was set aside.

Having been led to this digression, by the present parliament being assembled in the first year of a minor king, I shall now proceed to consider the subject-matter of the statute.

The 6th chapter is the only part of the law which is not translated, and is at the same time the only one which requires any

[b] It may be perhaps difficult to assign why a king of England was not to be a major till *eighteen*, whilst a queen became so at the age of *sixteen*. By the old German law, a man cannot grant freedom to his slave under the age of twenty; whilst a woman is permitted to have this power at the age of sixteen. Speculum Suevicum, cap. liv.

[i] Whoever consults the case referred to the judges by George the First (in Mr. Justice Fortescue's Reports) upon the question, whether the grand-father being king, or the father being only heir apparent, hath a right to take care of the education of the royal children, will find that the material precedents are likewise too few in number to settle that very important point.

comment.

comment. It recites, "that the *villeyms* [k] had assembled riotously in considerable bodies, and had, by the advice of certain evil counsellors and abettors, endeavoured to withdraw their services from their *lord*, not only those which they owed to him by tenure of their lands, but likewise the services of their body [l]." That they chiefly attempted to evade these services under colour of certain exemplifications from *Domesday-book* [m], with relation to the manors or villages in which they lived; and that, by false interpretation of these transcripts, they claimed to be entirely free. The statute therefore enacts, that commissions shall issue under the great seal, upon application of any *lord* (*seigneur*) to inquire into the offences of these

[k] I shall take the liberty of spelling this word out of the common method, to avoid the equivocal sense which it hath obtained at present.

[l] This is the distinction of services, which Littleton divides into villenage in *gross*, and villenage *appendant*.

[m] This is the only mention made of Domesday in the statutes. The common etymology of the word *Domesday*, in which all the Glossaries agree (viz. the comparison of it to the day of judgement), never appeared to me satisfactory: if this whimsical account of the name was the real one, the Latin for it would be *Dies Judicii*; whereas, in all the old Chroniclers, it is styled either *Liber Judicialis*, or *Censualis*. Bullet, in his Celtic Dictionary, hath the word *Dom*, which he renders *Sieur*, *Seigneur* (and hence the Spanish word *Don*), as also the terms *Deya* and *Deia*, which he translates *Proclamation*, *Avertissement*: Domesday therefore may signify the Lord's, or King's, advertisement to the tenants who hold under him, and this sense of the word agrees well with part of the contents of this famous survey. See likewise Upton's notes on b. i. canto vii. st. 26. of Spenser's Faerie Queene, where he produces instances of the word *daye* signifying judgement; and *Dayes-man*, an arbitrator, or judge.

In a petition to the king in parliament, by the treasurer and barons of the Exchequer, they certify with regard to the manor of Tring in Hertfordshire, "invenimus in *Libro vestro*, qui vocatur *Domesday*, &c." 6 Edw. I. A. D. 1278. amongst the collection now publishing by the munificence of parliament.

refractory *villeyns*; and that they shall be immediately committed to prison without bail or mainprize, if their lords shall so insist [*n*]. With regard to the exemplifications from *Domesday*, it is likewise declared, that the offering them in evidence shall not be of any advantage to him who shall so produce them.

Nothing could be more severe than this law in every part of it; and we find by different records in Rymer, that this oppression was, in reality, the occasion of the famous insurrection under *Wat Tyler* and *Jack Straw*, as well as the great opposition to John of Gaunt, duke of Lancaster.

The minor king had been advised, by one part of his council, to increase the power of the lower people [*o*], and to lessen that of the barons; in consequence of this a proclamation issued [*p*], which, amongst other things, directed, “quòd nulla acra terræ
“quæ in *bondagio* vel *servagio* tenetur, altùs quàm ad quatuor
“denarios haberetur; et si qua ad minùs antea tenta fuisset, in
“posterum non exaltaretur.” John of Gaunt put himself at the

[*n*] By 15 Rich. II. chap. xii. we find that, amongst other oppressions to the lower people, the lords instituted a kind of *quo warranto*, and obliged them to lay their title to their lands before their counsel or auditors; at least I understand the statute to convey this meaning. Algernon, the fifth earl of Northumberland, had, in the time of Henry the Eighth, a regular establishment not only for two counsellors who lived constantly in his house, but also for their servants. This, as well as many other curious particulars, appears in the lately printed *Booke of Orders and Direction for keepinge my Lorde's Hous yerely*.

[*a*] In the fifteenth year of this king, the barons petitioned the king, that no villeyne should send his son to school; to which the king gave the proper answer of *s'avisera*. Brady, vol. iii. p. 393. By a Scotch Statute however, of James the Fifth, every *freeholder* is enjoined to send his son to such a place of education.

[*p*] Rymer.

head

head of the barons faction, and procured a repeal of this proclamation in the year following [q]. The instrument above-cited, from Rymer, is attended with many others, pro rege Castellæ “super fictiones et diffamationes insurgentium—Pro rege Castellæ de securitate contra insurgentes;” which security is allowing him to be attended by a guard; and, lastly, he is appointed *Justiciary* to try them.

But to return to the tenure of villenage, which we hear nothing of at present; and therefore, as with regard to many other things which most commonly occur, no one scarcely considers whence this servitude hath been entirely dropt in this country, without its being abolished by any statute [r]. This is the more extraordinary, as it seems to be generally agreed by historians, that more than half the lands of England were anciently held by this tenure, and the greater part of the inhabitants were consequently in a state of vassalage.

Villenage was not only in the early centuries known throughout Europe [s], but continues perhaps in almost every other country [t] except England to this day. Though there seems to have been scarcely any difference in this servitude wherever introduced, yet the names have not any kind of affinity. The

[q] Ibid. vol. iii. part iii. p. 124.

[r] The statute of Charles the Second (or rather of Cromwell) abolishes those tenures only, which were attended with wardships, &c. besides this, we hear nothing of it after Queen Elizabeth; and little in her reign.

[s] Olaus Magnus indeed says, “nulla servitus apud Gothos, ut apud Danos.” p. 707.

[t] Many of the labourers, in the salt works and coaleries in Scotland still continue *glebæ ascriptitii*, and cannot be hired without the proprietor's consent. Diction. Decis. vol. i. p. 312. Anderson therefore is mistaken when he asserts, that all vassalage ceased in Scotland after the Protectorate. Hist. Comm. p. 106.

Saxon appellation was *Ceorl* [s], or *Agend-bine*. In the laws of Hoel Dda, the villeyms are called *Taeagua* [t], or *Fileinjaid*. These terms, or any thing relative to villenage, do not indeed frequently occur, as the tenures in Wales were almost entirely allodial; and there are not at present any copyholds in the counties of Anglesey, Carnarvon, or Merioneth; I am informed likewise that they are unknown in Ireland.

In Italy the villeyms were anciently called *Lazzi* [u] or *Liti*; and a particular class of them *Aldii*, who seem to have had rather more freedom than the others: they were also styled *Vafri* and *Accolæ* [w].

In Germany, and Prussia particularly, they still make a very considerable head of the law: in the king of Prussia's Code Frederique, they are called *Eigenbehorigen* and *Unterthanen*; where they are described to be such as are "attachés à certaines terres de leurs seigneurs," and hence, in the old French law,

[s] Hence the old word *carl*, or *carle*.

[t] From hence *Teague* is probably a term of reproach amongst the Irish; though the villeyms, which they had anciently, seem to have been more commonly styled *betaghii*, or *betaghies*.

[u] Hence possibly the French word *lache* or *base*. The word *luzzo*, however, is clearly of Italian origin, from the two z's, which is peculiar to that language. *Dante* uses this word to signify sour, or of an austere and harsh taste:

"Et e ragon, che tra li *lazzi* forbi,

"Si disconvien fruttare il dolce fico."

Inferno, canto 15.

Schilter, likewise, hath the word *lafs*, or *laz*, which he renders *tardus*, *segnis*, and whence undoubtedly our word *lazy*. To these names, for the different kind of slaves, may be added *Casales* and *Casati*, *Coloni*, *Casarei*, and the most general term of all, *homines proprii*. See Potgeserus, l. i. c. iii.

[w] *Lindenbrog*, passim. *Baluz*. vol. ii. p. 746.

they

they are termed *Serfs de poursuite*, because they may be recovered on a pursuit.

With regard to the word *villey* itself, so well known to our ancient lawyers, though so little heard of in more modern times, Voltaire gives us this etymology, "villein vient de ville, parce que autrefois il n'y avoit de nobles, que les possesseurs des châteaux [x];" Froissart, in the time of Edward the Third, applied it to *the mob of London*, "vous devez scavoir que *les vilains de Londres* estoient grandement corroucés; et dissoient, haa gentil Chevalier Comte de Derby [y], les grans envies qu'on a fur vous!"

I shall now endeavour to shew in what light these villeyes were considered in different periods of the British history, and how the tenure was at last, almost insensibly, forgotten and abolished.

To begin with the authority of Cæsar, speaking of the Gauls, to whose customs ours at that time are known to have borne so great an affinity, "Cum ære alieno, aut magnitudine tributorum, aut injuriâ potentiorum premuntur, sese in servitutem dicunt nobilibus; in hos omnino eadem sunt jura, quæ domino in servos." Strabo says also that the exportation of slaves from England was considerable in his time, ταῦτα δὲ κομιζέσθαι ἐξ αὐτῆς, καὶ δερμάτια, καὶ ἀνδραποδα; to these articles he afterwards adds, hounds [z].

[x] Add. Hist. Univ. p. 151. It should seem that, for the same reason, the name of burghers derogates from nobility. Pasquier confirms this etymology of Voltaire's by some lines cited from Hughes de Bercy, who lived in the time of St. Lewis:

"Mais li Roy, li Duc, et li Comte

"Ors fuyent ils les bonnes villes."

Recherches de la France, p. 129.

[y] Afterwards, Henry the Fourth. Froissart, part iv. p. 316.

[z] Strabo, l. iv. p. 199. ed. Paris, 1620.

In the *Judicia Civitatis Londoniæ*, which are translated by Wilkins, and supposed to have been collected in the time of Æthelstan, it is directed, that a slave, who hath been guilty of stealing, shall make his master liable to satisfaction, *secundum vultum ejus*, (sc. servi), which not only shews that they were then sold, but valued as cattle [a].

Bracton is our most ancient writer on the law, except Glanvil; and he gives this account of the state of villenage in his time, which had then become infinitely less servile: "*Glebæ ascriptitii liberi sunt, licet faciant opera servilia; cum non faciant eadem ratione personarum, sed ratione tenementorum* [b]; et a glebâ removeri non possunt, quamdiu pensiones debitas persolvere possunt." And in another part, "*purum villenagium est, qui scire non potest vespere, quale servitium fieri debet manè.*"

The next authority, with regard to the condition and situation of this rank of people, which I have happened to meet with, is that of Froissart, who informs us, that "*un usage est en Angleterre (et aussi est il en plusieurs pais), que les nobles ont grants franchises sur leurs hommes, et les tentent en servage* [c]."

There is an instrument in Rymer, executed by Edward the Third, during the 12th year of his reign, in the following words:

"Rex omnibus, &c.

"Sciatis quod per finem quem Johannes Simondson natus noster manerii nostri de Brustwyk fecit coram dilectis et fidelibus nostris Johanne de Molyne, Nicholao de Berwick, quos

[a] Wilk. LL. Anglo. Sax. p. 67.

[b] This is clearly confined to what Littleton calls *villenage regardant*.

[c] I will make no apology for citing Froissart, though born in Flanders: he had lived many years in England, and had an office under Philippa of Hainault, queen of Edward the Third.

"assigna-

“ assignavimus ad hujusmodi fines ad opus nostrum de nativis
 “ nostris partium illarum pro manumissione eorundem recipi-
 “ endum.

“ Manumissimus præfatum Johannem Simondson, et totam fe-
 “ quelam suam, et ipsos ab omni servili opere exuimus, et erga
 “ nos exoneravimus [d].”

Edward the Third was at this time in great necessity, and the general commission for the manumission of his villeyns, here cited, may be considered perhaps as the first general cause of their enfranchisement. It could not be looked upon as wrong in a great man, when he wanted money, to copy this example in his sovereign.

In the year 1514, Henry the Eighth manumitted two of his villeyns in the following form; “ Whereas God created all
 “ men free, but afterwards the laws and customs of nations
 “ subjected some under the yoke of servitude, we think it *pious*
 “ and *meritorious with God* [e] to manumit *Henry Knight*, a tay-
 “ lor, and *John Herle*, a husbandman, *our natives* [f], as being
 “ born within the manor of Stoke Clymmyland, in our county
 “ of Cornwall, together with all their issue born, or to be born,
 “ and all their goods, lands, and chattels acquired, or to be

[d] Rymer, vol. ii. part iv. p. 20.

[e] In the year 1536, and 28 Hen. VIII. a bill, *concerning Bondmen*, was rejected by the House of Lords on the third reading, which according to this idea (of its being *meritorious with God*) was probably for their general manumission. Manuscript Calendar of the Journals of the House of Lords. Baluzius mentions a letter from a king of France to his vassal, by which he orders him to enfranchise three of his villeyns, on account of the joyful event of the birth of a prince. Collect. p. 316.

[f] The *nativus* became a villeyn, by being born in servitude, within a particular manor or district. In Pomerania, if the peasants ran away, they must be delivered up to their Lord; some of them, however, may sell the land, (which enslaves them,) paying ten *per Cent.* to the Lord. Busching's Geogr. vol. vi. p. 67.

R r

“ acquired,

“acquired, so as the said persons, and their issue, shall from henceforth be free, and of free condition.”

The above-cited form of enfranchisement [g] explains the general condition of these people: if born within a certain district, they and their issue [b] were the bondmen of the lord; whatever personal property therefore they acquired, they laboured for his advantage, and not their own. Besides this, they could not leave the manor, on which they were from their birth in a state of servitude, without the leave of the lord; and therefore, according to *Bracton*, “*liber est qui potest ire quò vult* :” and hence the writ in the register, “*Præcipimus tibi quòd justè et sine dilatione facias habere A. de C. B. nativum et fugitivum, cum omnibus catallis suis, et totâ sequelâ suâ*.”

They were also, by the customs prevailing in particular districts, subject to services not only of the most servile, but the most ludicrous nature, “*Utpote die nativitatis Domini coram eo saltare, buccas cum sonitu inflare, et ventris crepitum edere* [i].” In some manors, the lord had “*jus laxandæ coxæ sponfarum vassallorum* ;” and yet, if the vassal retaliated upon

[g] I cannot recollect whence I transcribed this, though I should believe from Rymer.

[b] This explains what frequently occurs in ancient grants of villeyns *cum totâ sequelâ suâ* ; which, according to Sir James Ware, in his account of the *Betaghii* (who were the Irish villeyns) included not only children, but nephews, p. 149. See also Madox’s *Form. Angl.* p. 416. If the mother of the children was a *nief*, and the father was *free*, the children became free, contrary to the rule of the civil law, *Partus ventrem sequitur* ; and contrary to the rule of the old French law, *La verge annoblist, et le ventre affranchist*. Hobbes contends, that the dominion of the mother over the child, rather than the father, arises not from the generation, but preservation of it. *Works*, p. 65. ed. 1750. Gemelli informs us, that in the Philippine islands, when a freeman marries a slave, the first child *patrem sequitur*, the second is of the same condition with the mother, and the third is *mezzo libero*. Vol. v. p. 85.

[i] *Struvii Jurispr. Feud.* p. 541.

“ the

“the lord’s wife, he lost his feud *per feloniam* [k]. Struvius also informs us, “In dominum peccat vassallus, si dominum cucurbitaverit, five cum ejus uxore concubiverit, vel etiam *conatus fuerit* turpiter contrectando, vel osculando; hoc tamen non procedit *si cum vidua domini*, nisi intra annum luctus.” Sir Richard Cox, in his History of Ireland, likewise mentions some very ridiculous customs, which continued in the year 1565; and Blount hath written an express treatise upon what he styles *focular tenures*.

Fitzherbert, who made his reading upon the fourth of Edward the First, entituled, *Extenta Manerii*, not long after the manumission before cited, gives us this account of the state of villenage in the reign of Henry the Eighth, and that this kind of tenure began then to decrease in all parts of England: And in “mine opinion villenage began soon after the Conquest, when “the conqueror rewarded all those who came with him in this “voyage royal according to their deserts: and to honorable “men he gave lordshippes, manors, landes, and tenements, “with all the inhabitants, men, women, and children, dwelling “in the same, to do with them *at pleasure*. And those *honorable men* thought they must needs have servants and tenants, wherefore they pardoned their inhabitants *of their lives*, and caused them to do all manner of service, were it “never so vile, and took likewise all their goods and cattle at “their pleasure, and called them their bondmen: and since that “time many of *their noble disposition* have made to diverse of “the said bondmen their manumissions; howbeit in some

[k] The word *felony* in most parts of Europe is only used as synonymous to perfidy: “Felonie est pris pour perfidie, *et le seigneur peut le commettre contre son vassal*.” *Costumier de Piccardie*, p. 102. Hobbes combats much Sir Edward Coke’s etymology of this word from *fel*, and supposes it derived from *φελῆναι*, which signifies a deceiver, or impostor. Works, p. 620. ed. 1750.

"places the bondmen *continue yet.*" Fitzherbert after this gives it as his opinion, agreeable to the recital of the manumission by Henry the Eighth, *that no man should be bound but unto God*, and says, *villénage is contrary to the principles of Christianity* [1].

After this I find in Rymer a commission of Queen Elizabeth, in the year 1574, directed to Lord *Burghley* and Sir *Walter Mildmay*, for inquiring into the lands, tenements, and other goods, of all her bondmen and bondwomen in the counties of Cornwall, Devonshire, Somerset, and Gloucester, such as were by blood in a slavish condition, by being born in any of her manors, and *to compound with all or any such bondmen, or bondwomen, for their manumission and freedom.* This is perhaps the

[1] Sir Thomas Smith supposes, that the advice of the poorer clergy had contributed greatly to the abolishing this base tenure; but that the bishops, abbots, and priors, continued to keep them in this state of slavery, till partly for *money*, and partly for *the slander*, they consented to follow the better example set them by the inferior clergy. Sir Thomas Smith's Commonwealth, ch. x. It appears by the lately-printed Rolls of Parliament, that about the first year of Hen. IV. many of the *nativi* left the demesnes and manors of their Lords, and took refuge in the trading towns, whence the Lords could not claim them on account of their charters and privileges. See vol. iii. p. 448. This must have greatly contributed to the abolishing of villénage.

Norden, who wrote his *Surveyor's Dialogue* in 1618, gives this account of the dropping servile tenures: "The favourable hand of time hath much enfranchised the tenants of every manor in England; and many servile works have been due, and done by them, and in many places yet are, though the most are now turned into money." P. 34. "These services of husbandry were quickly after turned into rents, payable either in money, as in England; or in corn or other victuals, as in Scotland." Hobbes's Works, p. 651. Wright, who published the antiquities of Rutlandshire in 1684, speaks thus of villénage *in gross* being abolished in his time, "Villeins in gross are now quite worn out, and in process of time became like other men."

last mention of villenage, except arguments are drawn from old cases in the Year Books; and this commission indeed, taken together with other circumstances, fully explains why we hear nothing more of this kind of servitude [m]. The profits of the crown, or of the lord of the villey, became now very inconsiderable, as the services could only be insisted upon in the spot where he was born. Those who have seen day-labourers employed in the repair of the highways, for which they are to receive no wages [n], may guess in what manner these extorted services were performed. At the same time the villey was willing to pay a considerable fine to get rid of this badge of slavery; and the lord was enabled, by manumissions, to raise a large sum upon any extraordinary emergency: it is therefore not to be wondered at, as the consenting to drop these servile tenures answered the mutual convenience and advantage of both parties, that they soon entirely ceased [o].

This

[m] There is a dialogue, on the subject of Knighthood, amongst Mr. Petyt's Manuscripts, written by Thynne, Lancaster herald, and dedicated to King James the First.—In this dialogue the point is agitated, whether the king can confer knighthood on a villey, from which it should seem that some few of these bondmen still continued after the reign of Queen Elizabeth. Petyt, Mss. vol. xxxix. p. 119. B. For different forms of manumission in the time of the Saxons, see Hickes's Letter to Sir Bartholomew Shower, Thes. vol. ii. p. 22, et seq.

[n] It is most unjust, that the labourer should not be paid, as he receives no benefit from the improvement of the roads; this hardship indeed is now somewhat lessened by the late act of parliament.

[o] Having had occasion to mention that this servitude prevailed, and continues in most parts of Europe, I shall cite some passages, chiefly from Lindenbrog's Collection of ancient Laws, which will shew in what light the velleys were considered in other countries. In the first place, they could not be witnesses *,

* Contemnere fulmina pauper

Creditur atque Deos, Diis ignoscentibus ipsis.

Homer indeed gives a better reason for rejecting such witnesses,

Ἡμῶν γὰρ τ' ἀρίστῃ ἀποαινύται τελευτὰ Ζεύς

Ἀνθρώποι, ἐν τ' ἀν μὴν καὶ δούλων ἡμῶν ἰλησύν.

Odyss. P. 322.

“Si

This certainly was the principal reason; but other causes concurred. The *Lord*, and *Man of property*, began now occasionally to leave his castle or seat in the country, and wanted not only the services of his villey in the demesne lands, but the expence of attending parliament, the court, or his own amusements, required rents paid in money. The lord was therefore not only willing to commute, but likewise to grant long leases, that he and his descendants might have a certain income, whilst the tenant, now having a more permanent interest in his farm, was both able and willing to improve it. Besides this, we find by the recital of the manumission by Henry the Eighth, and

“ Si servus servum ictu uno, vel duobus, vel tribus, percusserit, *nihil est.*” Inter Leges Ripuariorum.

“ Qui percusserit servum suum, et mortuus erit in manibus, jus erit; si supervixerit duo vel tres dies, non subiacebit pœnæ, *quia pecunia est ejus.*” Inter Capit. Kar. Magni.

“ Constat me vendidisse servum juris mei, non furem, non fugitivum, sed sanum corpore bonisque moribus instructum.” Baluz. vol. i. p. 473. *in formulis Sirmondicis.*

“ Histrionibus et omnibus illis qui aliorum homines proprii sunt datur umbra hominis (for slight injuries) quæ a lumine solis opposito provenit. Hoc ita intelligendum est, si quis contra ipsos aliquid committit ob quod emenda debetur, tum debet stare prope parietem quem radii solis illuminant, quo facto, histrio, aut servus debet umbræ hominis alapam infligere; hæc vindicta ipsi satisficit.” Speculum Suevicum, cap. cccv. f. 13, et 14. By the same chapter the slightest injuries to a freeman are punished by very heavy fines.

That they had formerly the lowest opinion of this class of men, appears likewise from these two very ancient French verses,

“ Oignez vilain, il vous poindra;

“ Poignez vilain, il vous oindra.” Inst. Coustum.

which we apply to spaniels at present. Thus likewise the Scotch proverb:

“ Kiss a carle, and clap a carle, and that’s the way to tine a carle.

“ Knock a carle, and ding a carle, and that’s the way to win a carle.”

Kelly’s Scotch proverbs, p. 228.

likewise

likewise by the conclusion of what Fitzherbert says, with relation to these tenures in the same reign, that a notion, originally inculcated by Wycliff and his followers, began to prevail, *of its being contrary to the principles of the Christian religion that any one should be a slave*; and hence, in more modern times, slavery hath been supposed to be inconsistent with the common law, which is said to be founded upon Christianity [p].

Be the law as it may, the persuasion contributed greatly to the abolishing villenage; and the principle, whether adopted by the common law from Christianity, or otherwise, cannot be too much commended or insisted upon: I cannot however but think, that neither the Christian religion, nor the common law, ever inculcated or established such a tenet [q].

In the early ages of Christianity, every house was filled with slaves: it was therefore highly incumbent upon those who professed this religion, and were willing to become martyrs in support of it, to have frequently insisted upon what now appears to be the common rights of humanity. On the contrary, St. Paul writes his Epistle to *Philemon*, expressly to excuse *Onesimus*, *Philemon's* slave, for having run away from his master; and, if the whole context is properly considered, no such doctrine is advanced; it was, at the same time, most particularly proper to have laid it down with precision upon such an occasion.

[p] We find by Stiernhook, that this same notion hath either abolished, or greatly mitigated, the servile tenures in Sweden.

[q] It appears by Boulainvilliers, that this question was formerly much agitated in the French courts of justice; but in the *Institutes Coutumières* (published at Paris in 1679) it is laid down with great precision, that a slave becomes free as soon as he enters the French territories, and is baptized: "Toutes personnes sont franches en ce Royaume, et sitost qu'un esclave a atteint les marches diceluy se faisant baptizer, il est affranchi," p. 2.

With regard to the law of England on this head, it appears by *Hakluyt*, that, in the year 1553, four and twenty negroes [r] were brought into England from the coast of Africa. These negroes must therefore have been sold in this country; and, if it had been contrary to law, they must have been set at liberty, or the point at least discussed, of which we do not find the least traces: such a question also, being a liberal one, could not well have escaped the notice of Lord Verulam, who would undoubtedly have mentioned it in some of his treatises. Since the establishment of our sugar-colonies, modern opinions of great lawyers, and (it is believed) decisions of courts of justice, have contradicted this common and prevailing notion, *that a negro, when baptized, becomes immediately free* [s]. There hath lately indeed been a celebrated judgement in the court of King's Bench with regard to a black servant but I conceive that the only point determined in that case was, *that a master hath not a right to send such a slave out of the kingdom, in order that he may be sold.*

I have

[r] *Fuller*, in his character of *The Good Sea-Captain*, says, "In the taking of a prize he most prizeth the men's lives, whom he takes; though some of them may chance to be negroes or savages; and it is the custom of some to throw them overboard." This writer, who seems to have had a most excellent heart, thus continues: "But *our Captain* counts the image of God nevertheless his image, cut in ebony, as if done in ivory, &c." *Fuller's Holy State*, b. ii. ch. xxi.

[s] I find but one determination expressly to contradict this, which is in *Rushworth's Coll.* vol. ii. p. 468. In the 11th year of the reign of Queen Elizabeth, a slave from Russia was brought into England; and, his master insisting upon the power of scourging him, it was held that England was too pure an air for a *slave to breathe in*. This is advanced by the managers of the House of Commons in the case of the famous

John

I have been led to this length of observation on the ancient state of villenage, together with the causes whence this tenure hath now ceased, by the oppressive chapter [1] of the statute against this class of men; and cannot think, that a parliament, which could pass so unjust a law, deserved in any respect the appellation of the *Good Parliament*, which Stow informs us it had obtained.

John Lilburn, who was most illegally punished; but it does not thence follow, that all the doctrines advanced on that occasion were *law*: a slave may continue in a state of servitude, *though he breathes the air of this* land of liberty; the law of which will protect him from the too severe punishments of his master, though it may not entirely emancipate him. The term of *slave* is certainly not unknown in our law, as by 1 Edw. VI. chap. iii. a vagabond and idle servant is to become a *slave* to his master; and the expression is frequently repeated in that statute. On this point, however, I need scarcely refer the reader to Mr. Hargrave's learned argument, which hath been lately published.

The 110th article of the laws of Carolina, as compiled by Mr. Locke, consists only of the following words: "Every freeman of Carolina shall have power and authority over his negro slaves, of what opinion or religion soever."

[1] It should seem that this chapter is repealed by 2 Rich. Stat. ii. ch. ii. but the beginning of it is misrecited, which is not very unusual in ancient recitals.

STATUTES MADE AT GLOUCESTER,

2 Rich. II. Stat. i. A. D. 1378.

THE three first chapters of this law relate to trade: the statute recites, that many of the great towns, being probably possessed of absurd privileges by their charters would not permit any alien merchant to traffick, and therefore enacts that whoever shall bring, by land or sea, wines, *avoir-de-pois*, sustenance, victuals, or other things, shall not be molested. It should seem, from this allowance of the importation of provisions, that the legislature did not attend so anxiously to the improvement of their rents and estates, as they have in more modern times, when laws of the same nature have been proposed.

The latter part of the chapter mentions cloth of *gold* and *silver*, which shews that luxury and trade had now greatly increased; I should suppose, that the importation of these costly manufactures, was occasioned by the *Jubilee* in 1376, and fiftieth year of the reign of Edward the Third.

The fifth chapter of the statute is what is generally known by the title *De scandalis Magnatum* [u]. It was certainly occasioned by the defamation of John of Gaunt, by those who supported the lower people and villeyms against the barons, as I have in the observations upon the last law cited an order from Rymer, which is entitled, *Pro Rege Castellæ* [w] *contra defamationes insurgentium*.

[u] It is said by Sir Robert Atkins, 2 Mod. 161. and Freem. p. 222. that this statute operated only as a promulgation of the common law; and that no action was brought upon it for 100 years or more, after it was first enacted. The statute speaks of "prelates, dukes, earls, barons, "and other nobles, and great men, of the realm; as also the chancellor, "treasurer, clerk of the privy seal, steward of the king's house, justices, "of the one bench or the other, and of other great officers of the realm."

[w] It is well known, that John of Gaunt had assumed the title of King of Castile.

The statute likewise recites, that these defamations may be the occasion of *disputes* between the lords and *commons*.

It should therefore seem that the law does not extend to the slander of any one, from which no such terrible consequence can probably arise; especially as the punishment is imprisonment, till the first author of the defamation can be found.

The slander also seems by the preamble to be confined to the imputing false facts or words supposed to have been done, or spoken, by the *great men*.

There are some very singular laws of the ancient Burgundians, with regard to abusive words.

“Si quis alterum *concagatum* [x] clamaverit, 120 denariis mulctetur.

“Si quis *vulpeculam* alterum clamaverit, vel *leporem*, eodem modo mulctetur.”

These appear plainly to be the laws of a warlike nation, in which the calling another by a name, which implied cunning or flight, rather than courage and resistance, was thought a very heinous injury. One of Ælfred's laws against slander is still more severe, “qui falsi rumoris in vulgus sparsi author est, linguâ præciditor [y].”

By the laws of the Goths (whilst in Spain), it is made penal to say of a great man, that he is gouty; or to omit the proper address in a petition or letter [z].

By the 6th chapter, which is not translated in the common edition of the statutes, it is recited, that great misdemeanors

[z] I choose that the Glossary to *Lindenbrog* should explain the meaning of this word, who apologizes by *bonos sit auribus*. Rastall hath mis-translated the word *mensonges* in this statute, as he renders it *messages*.

[y] *Thou shalt not raise a false report.*

[z] Feuro Real. de Esp. 209. See also Menagiana, T. i. 165. where the following supposed canon is quoted, “Si quis dixerit episcopum podagra laborare, anathema sit.”

had been committed in the marches [a] of Wales; and particularly, “qu'ils ravissent *dames et damoifelles*, et les enmes-
 “neut en estraunge pais, ou leur plest.” It appears from this that a knight-errant might in some parts of the world have been of use as a peace officer. “Nihil enim gloriosius fuit quam bello et
 “raptu (more Laconum) maritali: quare qui hosti, aut inimico,
 “sponsam, uxorem aut filiam ereptam sibi copulasset, egregium
 “et viro dignum facinus patrâsse visus est; celebratus laudi-
 “bus, quarum plenæ sunt historiæ, et cantilenæ scaldorum
 “vetustæ [b].” These outrages were generally committed upon the confines [c] of two countries, where no regular courts of justice were established for redress of injuries; we find therefore that the marches between France and Spain were likewise the principal scene of Knight-errantry. When this extraordinary method of redressing injuries ceased; Hector Boethius informs

[a] *Marche* is an old English word for a *boundary*; and hence the German title of *margrave*, signifying the governor of a district, which borders on another territory, or what, in the old English writers, is sometimes called *bateable* ground, i. e. *debatable*. The word *marche* is still used in Scotland, to signify the boundary of a parish; but more commonly of an estate. The French have formed a verb from this substantive, “Ceste nation de François est si prochaine d’Italie, que les
 “deux pais *marchisent*.” Fauchet’s Orig. de la Langue et Poësie François.

[b] Stiernhook, De jure Sueonum vetusto, p. 152.

[c] “Latrocinari *extra fines cujuscunque civitatis* nulla est infamia” (Cæsar, De Bello Gallico); and Dion Cassius, speaking of the inhabitants of the marches between Scotland and England in the time of Severus, says, λησυστικὴ ἥδιστα. l. xxvi. It is remarkable also, that the same author takes notice, that the Highlanders were at that time barefooted. *ibid.* He likewise informs us, that they were excessively hardy, and had a kind of *alimentary powder*, which prevented hunger, if they ate only a piece of it no larger than a bean. *ibid.* Zonaras also mentions, that the *Mæatæ* would hide themselves, for a whole day, up to their chin in a bog, when it was necessary to conceal themselves for a robbery. Inter Byz. Script. p. 460.

us, that great reliance was placed in the *steut*, or blood-hound; to which if a borderer denied entrance into his house, he was by the *Marche Law* considered as accessory to the murder which was investigated [*d*].

The earl of Monmouth [*e*] gives us, in his Memoirs, a very particular account of the state of the marches between Scotland and England in the time of Queen Elizabeth; he mentions also that one *Giordie Bourne*, a famous moss-trooper, confessed that he had murdered seven Englishmen, and ravished above forty women [*f*]. James the First, therefore, who had been told that a cow had strayed from the Highlands of Scotland to the Southern parts of England, asked, *How passed she unstolen through the debatable lands?* Lord Herbert of Cherbury, likewise, in his Memoirs, takes notice of the great state of disorder in the Welsh marches during the reign of Henry the Eighth; we find also that the Gubbins, or people who inhabited *Dartmore*, which separates Devonshire from Cornwall, were *to a proverb* pilferers and lawless [*g*].

That learned antiquary Bishop Nicholson hath published a collection of the laws, which prevailed in the *borders* (as he styles

[*d*] Holl. Tr. Heft. Boeth. ch. viii.

[*e*] See his Memoirs, lately published.

[*f*] This famous free-booter was hanged at last for what is called *march-treason*.

[*g*] Carew's Cornwall. Fuller (in his English Worthies) speaks thus of the *Gubbins*: "This land is a Scythia within England, and they pure heathens therein. It lieth near Brent Tor, on the edge of Dartmore. "Their wealth consisteth of other men's goods, and they live by stealing the sheep on the moore, and vain it is for any one to search their houses, "it being a work beneath the pains of a sheriff, and above the power of "any constable: howbeit they begin now to be civilized and baptized." P. 248.

Nath. Bacon informs us, that anciently there were twelve Lords Marchers, six Britons, and six Saxons; but does not cite his authority.

them))

them) between England and Scotland; as for the marches of Wales, they were, from the time of Edward the Fourth, chiefly governed by a president and council, which generally was held at Ludlow, till abolished by the act of King William. There is, in the seventh volume of Rymer, a copy of the instructions to Lord *Compton*, president, and the council of this court, which shews the extensive powers it was formerly invested with.

Gale [*b*] hath given us some instances of the kings of England obliging the inhabitants of the counties near the Scotch and Welsh borders to make good the damages which any individual might have received by the irruption of the enemy; and upon this principal probably, that they should have been better prepared to resist the invasion of such lawless maroders. The king sometimes also remitted taxes to these inhabitants, on account of their having suffered by the depredations of their pilfering neighbours.

[*b*] In his Honour of Richmond.

STATUTES MADE AT WESTMINSTER,

5 Rich. II. A. D. 1381.

THE statutes throughout this reign continue, in most instances, to be *capitularies*; yet some of the undigested matter, which they contain, deserves observation.

The 2d chapter of this law is calculated to prevent the carrying gold, silver, or jewels, out of the realm. The method which it takes to effectuate this, is by enacting, that no one shall leave the kingdom [i] under penalty of forfeiting all their chattels except *lords*, or other *great persons*, *real* merchants, and the king's soldiers; it is to be observed also, that not only the person leaving the kingdom is thus punished, but the master of the vessel, which he makes use of, is likewise to forfeit his ship.

The law permits indeed not only the king's soldiers to pass without a particular licence, but that money may be exported to pay the wages of the troops at *Calais* [k], and other garrisons in the French provinces. There are earlier statutes than the present to prevent the carrying money out of the kingdom [l], and we find

[i] Licences may indeed be procured from certain ports, which are not ranged very geographically; as the statute, after mentioning *Yarmouth*, *Kingston upon Hull*, and *Newcastle upon Tyne* (all of which are on the Eastern coast), says, and other ports towards Ireland. This prohibition of carrying jewels, as well as gold and silver, out of the realm, shews that both trade and luxury had considerably increased. This part of the act is repealed by 4 Jac. I. c. 1. [Mr. H.]

[k] Froissart, who wrote part of his History during this reign, speaks thus of Calais, "c'est la ville du monde que la communauté d'Angleterre aime le mieux: car tant comme ils seront seigneurs de Calais, ils disent qu'ils portent les clefs du royaume de France à leur ceinture." Froissart, part iv. p. 136.

[l] Poor Erasmus lost his whole substance ("quæ tum erat exigua sed mihi maxima quum nihil superesset") from a seizure by the Custom.

find indeed this same idle apprehension in the laws of other countries; but no exception is made, by any former statute, with regard to the wages of these garrisons. Hence I conclude, that these fortresses began to be much more considerable than they used to be; as Edward the Third meant something more than an expedition of parade to France, and intended to make a permanent conquest. We hear indeed often of subsidies for carrying on the war in that country, but this is the first instance of providing a maintenance for a garrison in the French provinces, as before this they were repaired and manned at the expence of the district in the neighbourhood; for the levying of which there are many orders in Rymer [m].

The 3d chapter may be styled the first *Navigation Act*, and directs, that to increase the shipping, then greatly diminished [n],
no

Custom-house officers at Dover, under one of these laws. Previous to his leaving England, he had consulted his friend Sir Thomas More, who informed him, that he might carry any money out of the kingdom which was not English coin. Erasmus protests, that what he had with him was neither coined in this island, nor paid to him by any person in England, or on any English account. The money was however taken from him; and, on his landing in France, he immediately made a hasty collection of proverbs, which he printed for subsistence. *Erasmi opera*, Basileæ, 1540, vol. i. in *Catalogo Lucubrationum*.

[m] There are likewise in Rymer, many proclamations, ordering sums of money to be raised upon certain districts in England, for the repairing bridges and highways; a toll or pontage is also frequently granted by the king for a certain term of years, most commonly three. Many such instances occur in the lately printed *Petitions to Parliament*.

[n] I should suppose this decrease (if any) was not very alarming, as it hath already appeared, that luxury had made great strides in the country, and that gold and silver stuffs had been imported. The parliament, in the forty-sixth year of Edward the Third, makes complaint of the bad state of the navy in these remarkable words: "Item prie la commune
" que comme les merchantes et mariners d'Angleterre, que 20 anns passies
" et

no goods or merchandise shall be either exported or imported, but only in ships belonging to the king's subjects.

This excellent law [o] is in part repealed by the fifth of Elizabeth, ch. v. which is entitled, *An Act containing politic constitutions for the maintenance of the Navy*; the great policy of which is to oblige every one to eat fish, not for "any superstition with regard to meats," but for the increase of mariners: it need not be observed which of the statutes is founded upon the best principles, notwithstanding the pompous title of the latter.

In the year 1440, the commons petitioned the king, that no Italian merchants, beyond the streights of Morocco, should bring any merchandise into this realm, except the produce of their own countries, which the king most unwisely refused his assent to [p]. The Genoese and Venetians were at that time the common carriers of Europe; we therefore find, that the parlia-

"et toutdiz à devant, la navie de dit royaume en tous portz et bonnes villes, sur mier et sur ryvers, estoit si noble que tous les pays appelloient notre avandit seigneur le roi de la mer, et tous dotoient son pays le plus par mer et par terre per cause de la dite navie." The Abyssinians give a still higher title to the Portuguese: "ils font une si grande estime des Portugais, qu'ils les appellent les Dieux de la Mer." Le Grand's Translation of Lobo's Account of Abyssinia. Edward the Third, after his most important victories, affected to speak of the Spanish nation as pretending to the empire of the British seas.

Thus the title of one of his orders is, "De parando ad Guerram contra Hispanos dominium maris ad se trahere molientes," Rymer, Vol. iii. part i. p. 56.

[o] A statute of the following year rendered this law very ineffectual, by dispensing with foreign ships, if English vessels (proper for the trade) could not be procured.

"There are but three things, which one nation selleth to another; the commodity (as nature yields it), the manufacture, and the vecture, or carriage; so that, if these three wheels go, wealth will flow as a spring tide." Lord Bacon, vol. i. p. 466.

[p] Cotton's Records.

T t

ment,

ment, thus early in our history, endeavoured to check the maritime power of the Italian states, and to increase our own navy, by the same methods which constitute the chief regulations of the famous *Navigation Act* of Charles the Second [q].

The 5th, 6th, 7th, and 8th, [Mr. H.] chapters of this statute relate to the insurrections under Wat Tyler and Jack Straw; it is recited, that many of the rioters had been executed without due process of trial; but as the intention of those who had been guilty of this infringement of the law was only to put a stop to these dangerous insurrections, the king grants a general pardon to be pleaded against any prosecutions to be commenced [r]. This seems to be a law of as alarming a nature to the liberty of the subject as can be found in the whole code of statutes; but, continuing in the original French, it hath escaped the notice of historians, and writers on the law.

The next chapter enacts, that all manumissions [s] made during the late riots to villeyms shall be void, as being extorted by violence;

[q] It is an ordinance of the *Commonwealth* re-enacted.

[r] This was chiefly intended for a protection to the Chief Justice Trefilian, who had made a sort *Jefferies campaign* to try the rioters, according to the chronicle of Henry Knighton, “Nam quicunque accusatus erat coram eo, in causa supradicta, five justè five ex odio, statim ipsum mortis sententia plectebat. Et alios quidem decapitari præcepit, alios autem suspendi, alios verò trahi per civitates, alios autem eviscerari, et viscera concremari coram ipsis viventibus.” Decem Script. p. 2644. It should seem, however, that this account of Knighton is somewhat aggravated, for he plainly supposes that the punishment arose from the cruelty of the Chief Justice, whereas it was only the common sentence in cases of high treason, for which these rioters were probably indicted.

[s] It appears, by one of Pliny's Letters, that a Roman slave could not be made free, but by most express words of manumission, “scribis mihi Sabinam (quæ nos reliquit hæredes) Modestum servum suum nusquam liberum esse jussisse, eidem tamen sic adscriptisse, legatum Modesto, quem
6. “liberum

violence; and the 8th chapter supplies in some measure the deeds which were lost or destroyed during these insurrections; the occasion of which part of the law arose from the rabble having set fire to the inns of court. As for the last provision, it was necessary, and therefore just; but the making void a manumission, under pretence of its being extorted, could only become part of a statute, which had exempted those from prosecutions, who had executed criminals without a fair trial, and who were therefore themselves the more capital offenders.

“ liberum esse jussi. Quæris quid sentiam? contuli cum prudentibus: “convenit inter omnes, nec libertatem deberi, quia non fit data, nec legatum, quia servo suo dederit.” Pliny, lib. iv. epist. 10. He very nobly follows, however, the intention of the testatrix.

The Romans had a custom of enfranchising their slaves just before their death; which, I believe, hath not been taken notice of by those who have written in illustration of the civil law:

*“ Ne tamen ad Stygias famulus descenderet umbras,
“ Ureret implicitum cum scelerata lues,
“ Cavimus, et Domini jus omne remisimus ægro,
“ Munere dignus erat convaluisse meo;
“ Sensit deficiens sua præmia, meque patronum
“ Dixit, ad infernas liber iturus aquas.”*

Martial, lib. ii. epigr. 102.

The Chinese frequently enoble after death. See The Orphan of Chao amongst the Chinese Miscellanies.

STATUTES MADE AT WESTMINSTER,

8 Rich. II. A. D. 1384.

THE administration of justice was very corrupt during the infant king's minority. Besides the proceedings of *Trefilian*, with regard to the trials of the rioters observed upon already, it was one of the articles of impeachment against the archbishop of York, *Robert de Vere*, and *Michael de la Pole*, that they had taken from several parties large gifts and presents, in order to procure decisions in the courts of law by their influence over the judges; it is therefore enacted by the 2d chapter of this statute, that no one shall be judge of assise in his own county [1].

The

[1] Du Halde informs us, that no *mandarine* in *China* can decide any law-suit in the province in which he was born. Mr. Blackstone hath also observed, in his very learned and valuable Commentaries, that, by the civil law, the offence of becoming a governor in the province of one's birth is ranked with that of sacrilege. Blackstone's Comm. vol. iii.

By 20 Rich. II. ch. iii. no person of the county, whether *grand* or *petit*, is permitted to sit on the bench with the justices of assise, and probably from the same jealousy; by the ancient rules of the parliament of Paris, no member of that body may frequent the houses of princes, or go to the Louvre. It is not usual with us at present for the puisne judges to go to court. Bruffel, in his Treatise on Fiefs, cites the following lines from Gunter, to prove that the Emperor Frederic the First followed the same plan in the appointing his judges. T. i. p. 506.

— cunctasque per urbes

“ Electos in jure viros verique sequaces

“ Imposuit, medio qui cuncta negotia juris

“ Limite discuterent; nec eos ex urbibus iisdem,

“ Ne favor aut odium sensus corrumpat eorum,

“ Sed magis ex aliis ad munera pulchra vocatos.

“ Elegit, sacrâ vel delegavit ab ulâ.”

Some

The 3d chapter directs, that they shall not take reward or present from any one, except victuals or drink of a *very small value*, which permission was necessary, from the markets in country towns not being supplied as they are at present. The 4th chapter punishes the judge or clerk who shall make a false entry, or erase any part of a record, with fine or imprisonment, and he is also moreover to make satisfaction to the party injured by the alteration. It is remarkable, however, that this recompence is only for such a rasure as might be attended with the *disberison* of the parties, from which it may be inferred that personal estate was little considered, as an injury or fraud affecting this species of property seems equally deserving of punishment and reparation.

The last chapter explains what actions shall be tried before the constable or marshal, and recites their encroachments upon the common law to be a grievance to the subject [u]. Many causes concurred in making this jurisdiction odious and oppressive. In the first place the proceedings were upon written testimony, always more dilatory, more expensive, and more unsatisfactory, than when the decision depends upon *viva voce* evidence, as it does in a trial by the common law. Besides this, I cannot find that the constable or marshal had a deputy, or judge of his court to assist him, who was versed in the civil law by which the proceedings were to be regulated [w]:
the

Some have thought that this statute should be repealed, as supposing a partiality and bias in the judges: it however relieves them often from a disagreeable situation. See also 33 Hen. c. 24. Rastall.

[u] The punishments inflicted by the court of the earl marshal were often very severe. For example, Hollinshed says, that strumpets were frequently ordered to be dragged at the tail of a boat from one side of the Thames to the other. Vol. i. p. 185.

[w] In a commission to the earl marshal, in the seventh year of Charles the First, there is but one civilian (Sir Henry Martin), many of whose
decr

the parties therefore were always applying for prohibitions to the courts of common law, and the suit became doubly expensive by being afterwards litigated before another jurisdiction. This court hath scarcely a cause at present, the business having been greatly diminished by the loss of the French provinces, as the jurisdiction chiefly took place in contracts entered into out of the king's dominions. As for the trial by duel, the last instance is that of Lord Rea and Mr. David Ramsay, when the court was held by the earl of Lindsey then constable, together with the earl of Arundel as earl marshal of England [x].

Rushworth informs us, that the lord marshal spoke in defence of the court of chivalry, and the manner of proceeding therein

decrees were reversed by the House of Lords during the years 1641 and 1642; in one instance he was obliged to make restitution to the party injured. Journals of the House of Lords, June 5, 1641, et al.

The patent to the constable and marshal runs, "that they shall determine summariè et de plano, sine strepitu et figurâ judicii." Nicholson, p. 181.

The word constable is derived from *Comte d'estable*, or the officer who was to have the care of the king's stable: hence he presided at Tournaments and these sorts of trials.

[x] The title of this chapter of the statute is, *What suit shall be discussed before the Constable and Marshal of England*; and hence one of the great arguments in Dr. Oldys's case (reported in Shower's Parl. C.) is, that the court cannot be held but before *both* of these great officers. It being a *parliamentary decision*, it is impossible to know what weight this argument had in the House of Lords. See also on this head a letter from Selden to Archbishop Usher; Selden's Works, vol. ii. p. 1704. There is likewise a very complete and able treatise, with regard to the court of the Constable and Marshal, among Mr. Petyt's Manuscripts, vol. xxxvii. p. 71, et seq. which seems, by the conclusion, as also by the character of the hand-writing, to have been written in the reign of Charles the First. See also a treatise of Sir John Burgh, on the same subject, vol. xlii. where there is a comment on the present statute.

according

according to the custom of arms [y]: "That in these latter
 "ages the trial by duel had indeed been not frequently used, but
 "that this was to be attributed to the good government of the
 "kings of England; and added, that it was an error to apprehend
 "that, as soon as an appeal is brought, it was presently to be
 "decided by duel; whereas duelling *was the ultimate trial of all*
 "*others*; and even then it was in the arbitrement of the court,
 "whether it should be granted or not." After this follow all
 the proceedings in this appeal; and it is remarkable, that the
 defendant Ramsay, in his answer, alleges that the bill and ap-
 peal [z] *was and is false*, and that the appellant Lord Rea *did lye*
falsely, which is supposed by some to account for the *lye direct*
 being always followed by a duel even to this day.

I have had occasion on the statute (*incerti temporis*) *De magnis*
affisis et duellis, to mention a reason which might have reconciled
 this extraordinary kind of trial in some measure to ideas of
 justice, and, at the same time, took notice of an instance, from
 Grafton's Chronicle, which must have made it infinitely ridi-
 culous. There are not wanting circumstances to excite laugh-
 ter in the very minute account which Rushworth gives us of
 this intended duel between Lord Rea and Mr. Ramsay. The
 court, upon the petition of Lord Rea, permits him to have
 (whilst in the lists) *counsel*, and a surgeon with his ointments.
 They likewise allow him a seat, or pavilion, to rest himself, and

[y] Those, who may have a curiosity to see very minute directions,
 with regard to the method of proceeding in France, when the trial by
 battle was used, may consult Bouteiller's *Somme Rural*, p. 879, et seq.
 published with notes by Charondas, in 1603, Paris. As also Monsieur
 Brussel's late *Treatise on Fiefs*, t. ii. p. 993. The last decision of this
 sort was at St. Germaine en Laye, in the year 1547. *Essays on the An-*
tiquities of Paris by Saintfoix, t. i. p. 140. Paris, 1763, 12^{mo}.

[z] The appeal is brought against Ramsay for having had treasonable
 intentions.

wine:

wine for refreshment [a]; he is to have, besides, *iron nails, hammer, file, scissors, and bodkin*, together with *needle and thread*. After two or three adjournments, the king superseded his commission to the constable and marshal, and so ended the last of these absurd trials on an appeal of treason.

After this we find, in the same volume of Rushworth, an account of a duel in a writ of right, which was ordered before Judge Berkely, in the county of Durham, between Ralph Claxton demandant, and Richard Lilburn tenant, on the 6th of August, 1638. As there had been no instance of such a decision for many years before, the king, by an order of council, refers it to the judges of the Northern circuit to consider how it might be avoided, but with an intimation that he would not deny this method of trial, if it could not legally be prevented. Both parties, however, on the day appointed, brought their champions into the lists with their *batoons* and *sand-bags*; but the court, upon reading the record, found an error in it, committed by a mistake of the clerk [some said wilfully done (b)], on which the champions were not permitted to join battle. Rushworth likewise gives us the opinion of the judges previous to this. "The tenant waged battle, which was accepted, and at the day to be performed. Berkely justice then examined the champions of both parties, whether they were not hired for money, and they confessed they were; which confession he caused to be recorded, and gave further *day to be advised*: and, by the king's directions, all the judges were required to deliver their opinions, whether this cause was to *dearraign* [c] the battle by

" the

[a] It was this indulgence of wine that occasioned the death of the poor citizen, as the story is told by Grafton, he having made too free an use of this kind of refreshment.

[b] If it really was wilful, this does not seem *impeachable* either in the judge or clerk.

[c] *Deresner*, in the old Norman French, signifies *to deny*, or *refuse*

Coustume

“the champions: and the judges held, that this exception, coming after battle gaged, and champions allowed and sureties given to perform it, ought not to be received.”

As this last instance of a duel between champions on a writ of right seems to have given so much trouble to the king, judges, and parties, and was at last prevented by a perhaps wilful mistake in the record, it seems extraordinary that this absurd method of trial should not have been abolished by act of parliament: but, if there is any such statute, it hath escaped me, nor can I find such a reference in the common Indexes; though it appears by the Journals of the House of Lords, that a bill for this purpose had been twice read and *reported* in the year 1623 [d].

It is very remarkable likewise that the time when the trial by ordeal was disused does not appear, as, in the fifth year of King John, there is a very particular account of a criminal calendar both at Lichfield, and Lincoln, wherein ten or twelve criminals, being *malè-crediti* by the jury, are ordered to purge themselves either by fire, or water. One of these prisoners was hanged, because he would not submit to this kind of defence; and another, being a woman and sick, is permitted to defer the purgation by water. The expression, with regard to the trial by fire is, *portare ferrum* [e]; the throwing a witch into water seems

Coustume reformée de Normandie, vol. i. p. 107. Spenser, however, uses this word as signifying *preparation for battle*:

“Therewith they ’gun to hurtlen greedily

“Redoubted battayle, ready to *darrayne*.” Book i. c. 4. ft. 40.

[d] See the Journal of the 19th of March, 1623.

[e] Petyt Mss. vol. i. p. 110, et seq. We find traces of a similar method of trial amongst the inhabitants of ancient Italy.

“Summe Deûm, sancti custos Soractis Apollo,

“Quem primi colimus, cui pineus ardor acervo

“Pascitur, et medium freti pietate per ignem,

“Cultores multâ premimus vestigia prunâ.”

Æneid, l. xi. l. 785.

to be the remains of the other method of proving the criminal's innocence.

A writ to the justices in eyre for the counties of Westmoreland, Cumberland, and Lancashire, which issued in the second year of Henry the Third, makes indeed mention of these methods of decision having been forbidden by the Church of Rome, in the crimes of larceny, murder, and arson; after which it directs, that the criminals, for such offences, should only abjure the realm; so that possibly from this time the trial by ordeal was generally disused in England, in conformity to the ecclesiastical law [e].

Montesquieu supposes, that our ancestors seldom retained any marks of this punishment, because, being less effeminate than their descendants, their hands were sufficiently callous to resist the fire. It is scarcely necessary to refute so ridiculous a supposition; I should myself conceive, that the priest or judge, from the circumstances of the prisoner's guilt, made a discreet use of heating the iron. Something like this happens now, when a criminal is branded; and it was a regulation of the Anglo-Saxon law, that no one was to enter the church after the fire began to burn [f].

[e] Petyt Mss. vol. ii. p. 144. as also p. 159, et seq.

[f] Wilkins, p. 27.

A S T A T U T E,

Made 10 Rich. II. A. D. 1386.

THIS statute, after a short writ to the sheriff with directions to proclaim it as an act of parliament [g], consists merely of a very long commission to the dukes of *Gloucester* and *York*, the chancellor, and others, to examine into the state of the king's courts, revenues, grants, and officers fees, with this most extraordinary power, *to determine and regulate as they shall think proper, where no remedy is given by the common law.*

Dr. Brady, in the third volume of his History, informs us, that, at the close of the parliament-roll of this year, there is an entry of the king's making open protestation with his mouth, "that nothing which had passed during the session should prejudice either himself or his prerogative." This curious particular is confirmed by the preamble of 21 Rich. II. ch. ii. which repeals the above-mentioned most unconstitutional commission, with a recital, that it was *extorted* from the king by the duke of *Gloucester* and the earl of *Arundel*, who sent a great personage [b], to deliver this message to him, "that, if he would not give his assent to the com-

[g] This parliament is, by some of the old historians, styled the *parliament which wrought wonders*; and by others, the *merciless parliament*; which last appellation they seem by this law to have best deserved.

[b] "Un grant person, pier de la terre," in the original French. I should imagine that this expression of *Pier de la terre*, or, as we sometimes say at present, *Peer of the land*, was originally used to distinguish a Peer of England, from the *Pairs*, or *Peers*, of the French provinces, who were frequently employed by the kings of this country before we had *fortunately lost* these very inconvenient appendages.

"*mission*, he would be in *peril of his life*." Carte, in his History, hath endeavoured to establish the courage and martial spirit of this weak king; an attempt very similar to Dr. Middleton's in making a general of Cicero; the permitting such a preamble to an act of parliament seems to be a very complete refutation, if such was requisite.

STATUTES

STATUTES MADE AT WESTMINSTER,

13 Rich. II. A. D. 1389.

THE 5th chapter of this statute regulates in what things the *admiral* [i] and his *deputy* [k] shall meddle. The encroachments of this jurisdiction seem to be a natural consequence of those of the constable and marshal complained of before. One great office is very apt to follow the example of another which claims extraordinary privileges, especially if they have been asserted for some time with impunity, and derogate from the common law.

Argue not the use—

(as *Lear* says,) it is sufficient that it is called a *privilege*, or distinguishes any person in office from the other members of the community in which he lives; after this, if it is not only useless, but highly inconvenient and expensive, it seems [i] Popliniers, in his *Admiral de la France*, says, that the word *admiral* is by no means confined to signify a sea-officer; and cites Monstrelet's Chronicle for making use of the term *admiral des arbalestriers*. Amiraldu Ascaloni, amiraldu Cesareæ, amiraldu Ptolemaidis. Godefrido Duce Gesta Dei per Francos, t. i. p. 297. On the other hand, the Speaker (during the time of the commonwealth) writes to the generals Blake and Popham, commanders of the fleet. See Rymer, vol. ix. part ii. p. 139. A. D. 1650. It appears also by some verses of *Eustache Deschamps*, who wrote in the time of Charles the Sixth of France, that there were then knights in the sea service; as well as in that of the land,

“Bons sont les Chevaliers de terre,

“Bons sont les Chevaliers de mer.”

[k] By *deputy*, here mentioned, is meant the judge of the admiralty: there is a very able argument of Sir Leoline Jenkins on this statute before the House of Lords, in answer to Lord Chief Justice Vaughan. Wynne's Life of Sir L. Jenkins, vol. i. p. 78.

rather

rather to add to the obstinacy with which it is insisted upon [1].

As it was the intention of the legislature to circumscribe the admiral's jurisdiction by this statute, the total silence of the preamble, with regard to the warrants for *pressing* [m] mariners, seems very

[1] The exclusive jurisdictions in many corporations are both highly inconvenient and expensive to those who claim such a privilege; it is believed, however, that there hath never been an instance of an application from a corporation to be considered as part of the county in which the town is situated.

[m] This word was anciently spelt *impressing*, and consequently, being derived from the French *emprefter*, seems to imply a contract on the part of the seaman, rather than his being compelled to serve. The first use, that I have happened to meet with, of the term *press*, as applied to mariners, is in a proclamation of the 29th of March, in the fourth year of Philip and Mary, which recites, "that diverse shipmasters, mariners, and sea-fareinge menne, lately *prest*ed and *reteyned* to serve her Majestie, had withdrawn themselves from the sayd service, &c." Coll. Procl. vol. ii. p. 144. penes Soc. Antiq. The penalty by this proclamation is death.

See also another proclamation in the same collection, p. 151. where the word used, however, is *emprested*.

By a proclamation of the 15th of May, 1625, the word *prest*ed is applied to soldiers in the king's service: and by another of the 18th of June, 1626, the expression is, "every mariner receivinge *presse* money to serve the king."

By a proclamation likewise, of the 17th of February, 1627, pressed seamen are ordered to be billeted in the neighboured of *Lime-house*, *Blackwall*, &c. *ibid*.

Sir Edward Coke hath somewhere made observations upon the law maxim, "*that the king is entitled to every man's service*;" to which he adds this restriction, that the subject must be employed within the four seas: it is very extraordinary, therefore, that the case of the seaman, being perhaps sent to the antipodes, should have then escaped him. The reason of this seems to be, that there was not often occasion formerly to employ them (in the service of the government) on distant voyages. If one might

very remarkable, as well as that of the judges in their arguments with the civilians before James the First in council [n]. This is well known to be the greatest hardship that an Englishman is still obliged to submit to in this otherwise-free country, which necessity alone can justify towards those, to whom we owe our national importance, and on whom we must rely for its continuance. I do not mean by this to intimate that the pressing of mariners is not supported by usage and precedents, as far back in our history as records can be found, many of which are referred to in the case of *Alexander Broadfoot*, who was indicted for murder at the gaol-delivery for the city of Bristol in 1743. Mr. Justice Foster, who at that time was recorder of Bristol, hath published a very elaborate argument on this head, and hath supported the opinion which he then gave by authorities chiefly from Rymer's most valuable collection. As the law in these great constitutional points arises from such precedents, it seems to be an omission, if the whole records (provided the length be not very great) are not printed together with such argument, or treatise, as an abridgement often mistates

might be allowed to cite Shakespeare on a point of law, it may be supposed, that, in the time of Queen Elizabeth, shipwrights as well as seamen were thus forced to serve:

“Why such impress of seawrights? Hamlet, act i. sc. 1.

If it be said that the scene of this play lies in Denmark, it must be recollected, that Shakespeare generally transfers English manners and customs to every part of the globe, in which he chooses his characters should act.

Richard the Third, in the year 1484, issued a commission to Thomas Daniel, surveyor of his Works, “to take and seize for use within this “realm as many masons, bricklayers, and other workmen, as should be “thought necessary for the hasty expedition of the king's works within “the Tower of London, and palace of Westminster.” Stowe's London, vol. i. p. 79. ed 1720.

[n] See the Fourth Institute, c. xxii.

or

or misleads; and few will take the trouble to examine the original.

In the first order which is cited, the most material part, perhaps, to prove the power of pressing, is not stated. The commission is in the twenty-ninth year of Edward the Third, and it is thus abridged: William Barrett, commander of the ship "Julian, had a commission to make choice, and take up in the "counties of Kent, Essex, Surry, and Suffex, thirty-six mariners, and put them on-board his ship, in order to proceed "with the Prince of Wales, on an expedition to Gascony." Upon examining the original in Rymer, after this follows: "Et "ad omnes quos in hac parte *contrarios invenerit, seu rebelles, capiendum, et prisonis nostris mancipandum, et in eisdem moraturos, quousque de eisdem aliter duxerimus demandandum* [o]." I must likewise take the liberty to say, that some authorities relative to the power of pressing have escaped the learned judge, which I have happened to meet with, though not after making searches with regard to this particular question.

And first with regard to the power of pressing for the land service, of which there were formerly precedents [p]. In the
forty-

[o] The most general pressing warrant, which I have happened to meet with, is in Carte's Rolles Gascognes, tom. ii. p. 151. It is thus entituled, "De omnibus navibus et marinariis de admiratu occidentali arrestandis, "in resistentiâ inimicorum Franciæ, qui se parant tam ad villam *Calefiæ*, "et alia castra ibidem obsidendam, quàm ad regnum Angliæ invadendum."

[p] There is, in Carte's Rolles Gascognes, an order thus entituled, "De "miniatoribus *arrestandis*, ad deserviendum domino regi," p. 276; and it appears by the title of another order, p. 153, that these miners were generally taken from the *Forest of Dean*, having been probably employed in the coaleries there. We hear indeed little of these or other mines so early in the English history. I shall have occasion likewise, in some ob-
servations

forty-seventh year of Henry the Third an order issued to the sheriff of every county, that, taking to his assistance the *Custos*

servations on the third of Henry the Sixth, to take notice of a commission empowering the pressing as many labourers as should be thought necessary to assist in the works carried on in *Lyndsey Hundred* (in Lincolnshire) to keep off the sea. There is also, in Rymer, an order of Henry the Sixth, to authorize certain persons to press *minstrels in solatium regis*: those who were the objects of this very singular press-warrant (if I may so term it) did not probably dispute the authority: it remains however an instance of the extraordinary powers assumed, though by a weak king.

“De ministrallis propter solatium regis providendis.

“Rex dilectis sibi Waltero Haliday, Roberto Marshall, Gulielmo Wykes, et Johanni Clyff, sal.

“Sciatis quòd nos, considerantes qualiter quidam ministralli nostri jam tardè viam universæ carnis sint ingressi, aliisque loco ipsorum propter solatium nostrum de neceffe indigentes, assignavimus vos ad quosdam pueros *membris naturalibus elegantes*, in arte ministrallatûs instructos, ubicumque inveniri poterunt, tam infra libertates quam extra, *capiendum*, et in servitio nostro ponendum.” Rymer, 34 Hen VI.

Edward the Fourth, in the fourteenth year of his reign, issued an order “arrestare et capere *Aurifabros* pro apparitibus personæ regis.” Rymer, vol. v. part iii. p. 50. This king is well known to have paid great attention to the magnificence of his dress.

It should seem also, that even so late as the reign of Edward the Sixth, whenever a boy had a promising voice, he was forcibly taken from his parents, to be educated as a chorister for the king's chapel. I infer this from some lines, in a poem of Thomas Tuffer, Gentleman, entituled *The Author's Life*, printed in 1577, 4^{to}.

“Then for my voyce, I must (no choyce)

“Away of force, like posting horse,

“For sundry men *bad placards* then,

“Such childe to take.”

The Patentee in King William's time, having a dispute with Dogget the actor about articles, procured a messenger from the Lord Chamberlain's office to fetch him up from Norwich. He was released, however, by Lord Chief Justice Holt on being brought up by *habeas corpus*, and this proceeding was much censured by the Chief Justice. Gibber's Life, p. 205.

Pacis, he should collect out of every township at least four able-bodied men, who were to repair to London on a particular day [*p*]. Even so late as the year 1596, Stowe mentions, that a thousand men were pressed for the land service; they were afterwards indeed discharged, instead of being sent to France as intended; and the chronicler, who states the fact which happened in his own time, does not even hint at a doubt about the legality of this measure [*q*]. It is likewise asserted in Rushworth's Collections [*r*], that the power *to press soldiers* is not to be disputed.

[*p*] Petyt Mss. vol. ix. p. 157.

[*q*] Stowe, p. 709, and 769. This extraordinary and illegal power was assumed by Queen Elizabeth at the latter end of her reign, when from year to year she seemed more determined to convince her subjects, *that she was the daughter of Henry the Eighth*. It must be admitted, however, that the parliament seems to recognise such a power in the queen by the fifth of Elizabeth, c. v. s. 41. Sir John Falstaff, in the first part of Henry the Fourth, says, "I have misused the king's *press* damnably;" speaking of it as a known practice. See Act iv. Sc. 2. In the second part of this play indeed, when Falstaff brings his recruits before Justice Shallow, it should seem that there were sometimes temporary laws for raising men as hath not been unusual of late years. Rastel's Statutes, however, furnish no such instance during the reign of Henry the Fourth.

[*r*] Rushw. vol. iii. p. 77. in Append. The passage is taken from an argument of Mr. Mason of Lincoln's Inn, 4 Charles I: it need not be here observed, that there is no such power to press soldiers at present. See Hale's Pl. Cr. vol. i. p. 147. with regard to an Irish statute of 18 Hen. VI. cap. vii. against *cessing* or levying soldiers upon the subject, which was sometimes practised by the lord deputies and their council. This became one of the articles of impeachment against Lord Strafford. Ibid. Lord Herbert of Cherbury mentions, that himself and the earl of Oxford intended to raise two regiments for the Venetians, without seeming to have asked *any leave* from king or parliament for this purpose. Memoirs, p. 126. James the First permitted the Grand Duke of Muscovy to raise recruits in England. Harte's L. of Gustavus Adolphus, vol. i. p. 32.

A ferryman (if it be on salt water) ought to be privileged from being pressed as a soldier or otherwise. Savil's Rep. 11.

There

There is also an ordinance of the 28th of June, 1659 [s], which throws light upon this point, and shews the apprehension of what was supposed to be law at that time. It is entituled, *An Ordinance to encourage Mariners and impress Seamen*; the last clause of which is as follows; “And, lastly, for the better encouragement of seamen and watermen, to apply themselves the more willingly to this service, it is further enacted and ordained, that all mariners, sailors, and watermen, who have served an apprenticeship of seven years, shall hereby be exempted and freed from *being pressed to serve as soldiers in any land service*.” This ordinance likewise punishes the mariners, endeavouring even to avoid the being pressed, by imprisonment for six months.

With regard to the power of *pressing mariners*, Rushworth gives us this account of the temporary act of Charles the First [t] for this purpose. “Resolved, by the House of Com-

[s] In Scobell's Collection.

[t] 16 and 17 Charles I. ch. v. 23. and 26. Rushworth, vol. v. p. 261. In the forty-seventh of Edward the Third, many merchants petition the parliament against both their ships and seamen being *pressed*; but the reason assigned is, that they are kept on-board for a longer time than the king will pay them, without the least allusion to the illegality or hardship of the prerogative, except as far as they suffer in pocket by such detention. Pet. in Parl. vol. ii. p. 314. The king's answer is, “Areste de navires ne ferra fait mais quant il besoigne; et pariment leur ferra fait come ad ete use resonablement.” Ibid. There is also a proposal, which was published in 1695, by George Everett, in order to prevent the mischiefs and abuses by *disorderly press-masters*, which does not impeach the power of pressing, but only the abuse of it. See Harl. Misc. vol. iv. This proposal is addressed to the parliament.

In 1649, an ordinance, which took its rise in the House of Commons, was agreed to by the Lords, entituled, “An Ordinance giving power to the Trinity House to raise mariners and seamen for the defence of the king, kingdom, parliament, and city.” See the Lords Journals, 1st of August, 1646.

“mons, that there should be a bill to *empower pressing for the*
“service for a certain time, the house being very tender of bringing the
“way of pressing into example.” Nath. Bacon, on the other hand,
 in his chapter on the Admiral’s Court [*u*], says, “that the lord
 “admiral hath power not only over the seamen serving in the
 “ships of the state, but *over all other seamen, to arrest* them for the
 “service of the state;” and, by 13 and 14 Geo. II. ch. xvii. it is
 enacted, that no person may be pressed under the age of eighteen,
 or above the age of fifty-five, which seems by implication to au-
 thorize it with relation to those who are between those ages.

I have thought it not improper to state these authorities with
 regard to the great constitutional question of pressing, as the argu-
 ment of Mr. Justice Foster is the only treatise to be found in
 the law-books on this subject, and is by many conceived to have
 exhausted all the learning and authorities on this head. Should
 this point be ever agitated in a court of justice, he who makes a
 diligent and judicious search, need not despair of finding many
 fresh materials; and the silence of the common lawyers [*w*],
 with regard to these admiralty warrants, seems to be one of the
 strongest proofs in support of their legality, as well as that of the
 preambles to the statutes, which recite the encroachments of the
 admiral’s jurisdiction.

[*u*] Part ii. p. 26.

[*w*] Lord Clarendon (in his lately published Life) mentions the practice
 of pressing without any kind of reflection, or doubts of the legality of it.
 See p. 341. folio edition.

STATUTES MADE AT WESTMINSTER,

[x] 20 Rich. II. Stat. i. A. D. 1396.

I HAVE before observed, that the statutes throughout this reign continue to be *capitularies*: the three first chapters afford likewise an additional proof of the turbulent state of the times, and the great abuses in the administration of justice. We find in Rymer, as a prelude to the meeting of this parliament, an order from the king to his uncle the duke of Lancaster (who was unpopular from his oppressions to the villeyms), to raise 300 armed men, and 60 archers, for his protection during this session.

The first chapter directs, that no one shall ride armed with a *lancegaye*, which therefore must have been a weapon of which a very improper use might be made in a country now disturbed with every kind of riot and disorder. It is likewise afterwards enacted, that no one shall carry *palet*, *ne chapelle de fer*; and that the statute of *Chaperons*, made in the first year of this king's reign, shall be put in execution. The word *palet* is translated *sallet*, which seems to convey no idea whatsoever: I have lately been informed, however, that the word is used both by Chaucer and Shakspeare, as signifying a helmet, which I find likewise to be confirmed by the following passage in Favin's Théâtre

[x] Grafton, in his Chronicle, says, that Richard the Second granted the effects of the deposed archbishop of Canterbury to his successor, on condition that he complied with the statutes made in the twentieth and twenty-first year of his reign at *Shrewsbury and Coventry*. Grafton, p. 8. We must however suppose the parliamentary roll to be more accurate, which states this parliament to be held at *Westminster*, now become almost the only place which had proper accommodations for the reception of so numerous an assembly.

d'Honneur:

d'Honneur: "des ces morions, casques, heaulmes, et *salades* [y]." As the Glossary to Chaucer derives the word from the Italian *celata*, I should conceive, that the *beaulme* means the more open helmet, and the *salade* that which entirely covered the face.

As for the word *chaperons*, it is most improperly rendered *bats*, as they were not known or used at this time; and the statute alluded to is the 7th chapter of the first of Richard the Second, by which no one is permitted to wear the livery [z] of another under the name of *chaperon*, which signifies a *hood*. "Non deerunt qui hocce observationum nostrarum damnabunt, carpent, illudent, irridebunt, quique nos in eo grammaticos potius (atque utinam non grammaticulos) quam jurisconsultos fuisse dicent [a]."

It may perhaps appear too minute to dwell upon the meaning of such words in an ancient law: if they are printed however in our code of statutes, it is certainly proper that they should be understood. Ignorance of terms, used in records and books of antiquity, seems to have occasioned the word *escuage* or *scutage* (in every one's mouth who looks into the early parts of our history) to have been misapprehended. This is always supposed to be derived from *scutum*; and therefore the meaning affixed to this term is, a tax paid in commutation for providing a soldier

[y] Vol. i. p. 36.

[z] There are laws against the wearing of liveries in most of the countries of Europe, in order to prevent dangerous combinations: by those of Macbeth, it is even made capital. Hollinsh. Transl. of Hector Boëthius, p. 171. If the officers of the new-established militia should look upon themselves as a distinct body from the other inhabitants of the county, there are few points which might not be carried by such an association of men living often together, and wearing the same uniform, which unaccountably cements the union.

[a] Menage's Amœn. Jur. Civ. p. 429. He then defends himself by great authorities, who have thought it necessary to determine the signification of words in ancient laws.

with this kind of defensive armour [b]. The greater part of the ancient armies, after the declension of the Roman empire, by no means consisted of troops thus armed [c]; they had neither the practice nor habit which the Roman infantry was enured to, of marching under such a weight, nor could carriages be provided to relieve them from this encumbrance. In *Wachter's* *Glossarium Germanicum*, the word *schutz* or *schiltz* is rendered *sagittator*, in the Anglo-Saxon it is *scyttā* [d], in the Belgic *schutten*, and in English *shooter*. The *scutarii* therefore seem to have been only archers, whose arms were light, and could be easily carried by the soldiers on a march. It is well known that the English were famous for their skill in archery [e]; and hence we hear
fo

[b] “*Gunter* uses *chypeus* for a shield, instead of *scutum*, and from this shield I say it might well be called *scutagium*; as also from the service being performed *cum hastā et scuto*.” *Rel. Spelm.* p. 37. See likewise the Glossary to Kennet's *Parochial Antiquities*, in the article *Scutagium*.

[c] The officers might be armed in this manner, and perhaps some select corps. If shields had been commonly used, we should find them buried in every field of battle, and great numbers in every old castle.

[d] The infinitive *scotian*, in Saxon, signifies to shoot.

[e] *Roger Ascham* (in his *Toxophilus*) says, that archery was first introduced by the Saxons in the time of *Vortigern*, which is an additional proof that we must have recourse to the German language for the meaning of this word. The ancient German word for a shield is *schilt*, or *buchelere*, (see *Schilter's* *Gloss. Teut. in articulis*), whence our English words *shield*, and *buckler*. Those, who carried this kind of armour, were also called *buchalare*. I may likewise cite *Serenius* and *Verelius's* Swedish, *Bartholomew's* Danish, together with *Dr. Davis's* Welsh Dictionary, to prove that the word, which signifies a shield in any of those languages, hath not the least affinity to *scutum*, but on the contrary to *buckler*.

I have already observed, that *Ascham* supposes the English learned archery from the Saxons; and hence, by their ancient laws, there is a more severe penalty for hurting the finger, which is necessary in letting the arrow fly, than from the maiming any of the others. See *Schilter*, in articulo *Briaf*. But, to prove irrefragably that we derive archery from the Saxons,
the

so much in the very early part of our history with regard to the *scutagium*.

The 2d chapter forbids the yeomanry's [*f*] wearing the livery of any great man's band [*g*], "s'il ne soit menial et familier, ou officer continuel;" and the 3d directs that no one shall sit on the bench with the judge of assise, which shews the influence that was supposed to be used with the magistrates of those times.

Trefilian, *Belknap*, *Holte*, and *Bourghé*, are names long since branded, and infamous in our annals: the three last of these judges are permitted, by the 6th chapter of this law, to return from their banishment in Ireland, notwithstanding the statute of the

the two words *bow* and *arrow* need only be mentioned. *Bow* comes from the German word *bogen*, and *arrow* from the Saxon *apepe*: the French words *arc* and *fleche* have not the least affinity to these English terms. It is remarkable also, that *Nicetas Choniata*, in speaking of the English, who went with Richard the First on his crusade, styles them *Ἰγγλίοι πελεκυτφοροί*, so little does archery seem to have been introduced by the Normans. See his history amongst the Byzantine historians, p. 219. ed. Venet. Codinus Curopalata likewise (who lived later than Nicetas, and hath written a treatise upon the great offices, under the emperors of Constantinople) hath the following passage with regard to the English bearing battle-axes, and not arrows: καὶ τὴν γλωτταν αὐτῶν, ἤγουν Ἰγγλινισι καὶ ταῖς πελεκεῖς αὐτῶν συλκροῦντες, κλυπὸν ἀποτελευταῖ. c. vi. f. 12. Archery therefore seems to have been dropped immediately after the Norman conquest, and to have been revived by the crusaders, having felt the effects of it from the Saracens, who probably derived it from the Parthians. It is well known, that Edward the First was wounded by one of their arrows.

[*f*] This chapter hath not been translated in the old editions of the statutes: the expression in the original is *vadletz*, *ou yomen*. *Borel* (in his Glossary) says, that the word *valet* antiently was applied to the king's eldest son; and hence the *valet*, or knave, follows the king and queen, in a pack of cards.

[*g*] In the original, "liverie de compagnie d'ascun seigneur:" I have already observed upon the signification of the word *seigneur*.

eleventh of Richard the Second [b]. We find likewise that the next year the legislature reversed the sentence against Michael de la Pole (earl of Suffolk), who had acted in consequence of Trefilian's and Belknap's opinion, which is declared to have been a good and legal one. I cannot therefore but think that much injustice hath been done to the memory of these two judges, by the chroniclers writing with a strong bias of party, which is but too common with English historians. We have indeed, amongst the statutes of this next year, several very important queries [i], upon constitutional points, together with the answers of these judges, which receives the highest approbation from the legislature. Henry de Knighton, who was a determined partisan against

[b] I have looked into the statute, which is a very long one, and can find none of these names but that of Trefilian; this recital is therefore either inaccurate, or the eleventh of Richard the Second is not completely printed. In the Second chapter of the eleventh of Richard the Second, the names of three other judges are mentioned.

[i] Hayward, in his Life of Henry the Fourth, says, these queries were drawn up by a barrister, whose name was Blake. Skelton is another barrister, mentioned in the 12th chapter of the twenty-first of Richard the Second, and is described as *apris de la leie*, or "learned and versed in the laws," which makes it possible, that the word *apprentice* of the law may have been an erroneous manner of filling up the contraction *ap. de la ley*, which meant, perhaps, *apris*, and not *apprentice de la ley*. I shall here subjoin the whole passage, because it seems most clearly to allude to a barrister, as distinguished from a serjeant: "Et en mesme la manere Monsieur Thomas de Skelton *apris de la lei*, et William Hankeford et William Breschele Serjants du roy, demandez par le roi pour leur advys en cette partie, &c."

"Item supplient les communes qu'en chescune countee soient ordainez vi ou vii justices de la paix dont les deux soient *apprisez de la ley*." Rot. Parl. 2 R. II.

The word *appertises* d'armes is used also by Rabelais: "par vous feront faites *appertises* d'armes, non encore venues de nostre memoire." (Rab. t. ii. p. 99. Amsterdam, 1749, 4to). And Du Chat, the commen-

against the earl of Suffolk and the judges, gives us, in his chronicle, a very full introduction to those interrogatories [k].

The parliament of the twenty-first [l] of Richard the Second was the last held during his unfortunate reign. As he was a weak prince and entirely governed by his ministers, to whom he abandoned implicitly the care of all public affairs, it is impossible to form any idea of his merits or demerits as a legislator; and he hath permitted the preamble of one of the statutes of his reign [m] to inform posterity, that a threatening message brought by a single peer was sufficient to deter him from his most settled purposes. He suffered in the public opinion not only from his own weaknesses, but from the comparative lustre of the characters of his father and grand-father. This prejudice went so far, that it was insinuated he was not the real son of the *Black Prince*; and, if the picture which hangs near the pulpit in Westminster-

tator, cites this passage from Froissart, wherein the word *appert* is used to signify *expert*: “Le duc d’Irelande se refreschit de coursier bon et *appert*.” The contraction *app.* may therefore be filled up by *appert*, and not *apprentice*, if *appris* should be objected to.

It is not probable likewise that the law, which was so liberally professed in England, and which had such noble establishments, according to Fortescue’s account, should have borrowed, for one of its degrees in *science*, a term of *mechanics and trade*.

[k] See Decem Scriptores, p. 2693, et seq.

[l] Sir Robert Cotton (in his *Posthuma*) mentions a statute which passed this year, “*That whatever escheats to the king shall not be disposed of, and that the procurer of any such grant shall be punished by fine and imprisonment.*” Cotton, p. 170. We find no such law however in the Statute-book. Mr. Petyt likewise cites from the parliament roll of 1 Hen. IV. this very heavy charge against Richard the Second: “*fecit rotulos parliamenti pro voto suo deleri et mutari.*” Petyt, Mss. vol. E. p. 2. B. All the proceedings in parliament, of the twenty-first of Richard the Second, are repealed by the first of Henry the Fourth; and the eleventh of Richard the Second is re-enacted.

[m] 21 Rich. II. ch. ii. already observed upon.

Abbey is really an original, he certainly had not the complexion of his father, as I am persuaded he had the appellation of the *Black Prince* [n] from his dark hair, and not from the colour of his armour. The resemblance in point of feature and complexion is more to be relied upon, in proof of legitimacy, than any hereditary qualities of the mind, notwithstanding we are told, that

Fortes creantur fortibus, et bonis,

which we find contradicted by the instance of Edward the Second, as well as that of Henry the Sixth [o]. I had almost said, that it is providential for the liberties of a free country, that there should not be a long succession of great and able kings. If this consequence should not be apprehended by many, it must, however, be admitted, that it may secure, and perpetuate, the general liberties of mankind, as it would be impossible for any alliance or confederacy to resist such an increase of power in a particular state, as must necessarily attend the benign influence of a long series of wise sovereigns.

[n] I have somewhere read a passage, in one of the old chroniclers, where he is styled the *Black Prince*, before he had distinguished himself in arms; besides this, all princes and generals wore the same armour for the greater part of their campaigns, and yet we never hear of a *Blue* or a *Red Prince*. To this it may be added, that in England, where he seems to have obtained this appellation, he could seldom have had occasion to wear armour of any colour.

[o] “Et reputanti mihi, Diocletiane Auguste, neminem prope magnorum virorum optimum et utilem filium reliquisse clarum est. Denique aut sine liberis interierunt, aut tales habuerunt plerique, ut melius fuerit de rebus humanis sine posteritate discedere.” Spartian. Severus Imperator, c. xx.

STATUTES MADE AT WESTMINSTER,

1 Hen. IV. A. D. 1399.

THE new king's reign opens with a statute which consists of twenty chapters; two of which, the 6th and 13th, relate to the improvement and care both of the landed revenue of the crown, as well as the customs. The first of these, which directs, that, upon application for any crown lands [p], the petitioner must set forth the real value, or otherwise the grant to be void, was probably occasioned by the very improvident profusion of Richard the Second, either during his minority, or when, by his distresses afterwards, he was not in a situation to resist the application of those to whom he was in reality a prisoner [q]. Henry might

[p] This is followed by a very singular statute of the year 1403, declaring that the king will make no grants of lands but to those *who shall deserve them*; and if any one applies, not having proper merits, he may be punished at the king's pleasure. This law, if in force, would greatly lessen the number of applications. See Arthur Legat's Case 10 Rep. where the 4 Hen. IV. ch. iv. here alluded to, is said to have been the occasion of introducing the clause *ex mero motu* in grants and patents. Lord Coke also adds, that this statute was entitled on the roll *Brangwyn*, which in Welsh signifies *a white crow*, and it was called a *crow*, "*pur ceo que il fuit sovent vocant, et acquierant*;" and *blanke*, "*pur ceo que il ad aulica et candida vestimenta*."

[q] Henry himself must likewise have been much solicited for grants of forfeitures by those who had supported his cause. In the eleventh year of his reign, this king issued directions to the sheriff of Gloucestershire, which recite, that many annuities and pensions were paid out of the king's revenue in that county both by grants from his predecessors, and his own. It seems, however, that the sheriff was by no means
an

might indeed have revoked such grants, but his title to the crown was far from being a good one, and his situation in every respect very critical; it would therefore have been highly impolitic to have raised new enemies, and disturbed the grantee's possession, though obtained by improper suggestions. The regulation to prevent such imposition for the future seems to be a very wise one; and as I do not find that the act hath been repealed [r], it seems well to deserve the attention of the treasury at this day, though subsequent statutes have made considerable alterations with regard to the grants of crown lands.

The 13th chapter, which relates to the customs, seems likewise to claim the attention of the same board, as this statute also continues unrepealed, and enacts, that the comptrollers and searchers of the customs shall be resident in person at the port, without making any *deputy* to execute their office [s]. This abuse of turning the custom-house offices into *sine-cures* had begun to prevail in the reign of Edward the Third; for, by the grant of the comptrollership in the port of London to Chaucer (and no one hath so good a claim to a place of ease as a poet [t]), there is an express condition, that he shall not only reside, but make all the entries with his own hand. I believe it will not be easy to find such a condition in a modern patent.

an honest distributor of these pensions; for, according to favour and affection, he paid some of the annuitants scarcely any thing, whilst others received the whole which had been granted. See Rymer, vol. iv. part i. p. 178.

[r] It is much weakened by an explanatory statute of the following year.

[s] The officer's being able to pay a deputy out of his fees seems to prove a considerable increase of trade.

[t] Rymer's Fœd. The duke of Gloucester (uncle to Henry the Sixth) had an Italian in his service, whose name was *Titus Livius*, and who is recited, in his charter of denization, to have been both *Poet* and *Orator* to this duke. Rymer, vol. v. part i. p. 37.

The 20th and last chapter contains a general pardon, which, amongst some other exceptions, does not extend to a person *pris ove meynovere*, being what anciently was said by the crown lawyers to be caught in the *mainer*." As there was formerly a distinction between a murder openly perpetrated [*u*], or in a more concealed manner; so there was a difference made between a larceny, where the thing stolen was found in the criminal's hand, and where the proof depended upon other circumstances not quite so irrefragable. The former properly was termed *pris ove meynovere*, as in the present statute, and not *ove mainer*, or *mainour*, as it is generally written; the signification being, *to hold, or to be detected with the thing stolen in his hand* [*w*].

This seems likewise to be the meaning of the words *infangthef* and *utfangthef*, in grants of jurisdiction. The *Regiam Majestatem* speaks thus of such courts, "quædam placita criminalia pertinent ad quosdam barones, maximè qui habent et tenent curias suas cum focco et sacco [*x*], furcâ et fofsâ, *infangthef* et *utfangthef*."

Now

[*u*] Beaumont, in one of his plays, hath the following passage:

"How like a sheep-biteing rogue taken i' th' *manner*."

Which his commentators, not knowing to be a law term, have most ignorantly altered to, "taken i' th' *matter*." Rule a wife and have a wife.

The Greeks termed this apprehension of a criminal, *ἐπ' αυτοφωρῶν*.

By the old Scotch law, a murderer thus detected is said to be apprehended with the *reid band*.

[*w*] It is called, by Bracton, *bondhabend*, which amounts to the same, *or having in the band*. Thus also, by the *Speculum Suevicum*, "*delictum illud est Handgetat, in quo quis dum id committit deprehenditur*." c. cccxi. f. 1. Cotgrave says, that *mainouvrer* is an old Norman word for *holding*.

[*x*] See a better explanation of the meaning of these terms in Hickes's *Thes.* vol. i. p. 259. than is to be found elsewhere. The Saxon words are *saca* and *socna*, which he renders *jurisdictionem forenssem*. As for the *furca* (or gallows) mentioned above, it is throughout Europe the mark of a lordship or manor. Voltaire hath so many of them, on the estate which he

Now I should apprehend, though the Glossaries do not support the conjecture, that *infangthef* means exactly the same with the word *meynovere*, and signifies the *furtum manifestum* of Bracton, or the thief apprehended with the goods stolen in his hand, as *fang* is a Saxon word for the *gripe* or *fist* [y]. Some of the writers upon the old French law, if my memory does not fail me, style this detection of the thief *pris en poigne*. The inferior jurisdictions had cognisance of this crime, when the proof of guilt was irrefragable, and beyond a doubt; but, where the conviction depended upon a long series and chain of circumstances, the criminal could only be tried before superior judges.

he hath lately purchased in Burgundy, that he hath declared he can accommodate half the kings in Europe, but that he thinks them hardly high enough for this purpose. This is an anecdote, however, which I cannot pretend to warrant any further than that I have seen it in print.

The *fossa* is said by Du Cange to have been a pit filled with water, in which women, convicted of larcenies, were ducked.

[y] Hence Spenser, speaking of a strong wily Sarrazin, who seized the unwearied traveller, that happened to come near his castle,

“And some by sleighte he eke doth *underfange*.” b. v. canto ii. st. 7.

Infangthef and *utfangthef* will therefore signify a jurisdiction of trying every kind of larceny, whether the thief be detected with the thing stolen either *in* or *out* of his hand. “*The forefeng of a stray-beast* is used, pro “*pecudis errantis comprehensione et ejus pretio*.” See the Glossary to the Decem Scriptores, in articulo (*Forfang*).

STATUTES MADE AT WESTMINSTER,

2 Hen. IV. A. D. 1400.

THE 15th chapter of this collection of statutes is the first law that makes the offence of *heresy* [z] capital, which was either before this unknown, or the punishment left to the censures of the ecclesiastical courts [a]. Hollinshed [b] informs us, that Henry himself was rather inclined to favour Wycliff; and Grafton [c] mentions his having said, whilst he was earl of Derby, that *princes had too little, and religious houses too much*; which unguarded expression is supposed to have occasioned one of the rebellions during his reign. The king had been, in the early part of his life, a prince or soldier of fortune, and seems to have had rather libertine principles; he was now however advanced in years, and, having a very questionable title to the throne, was by no means in a situation wantonly to make so powerful a body as the clergy, his enemies [d]. This 15th chapter is the only one

[z] They called *heresy* anciently (at least in some parts of Europe) any particular doctrine, though it did not relate to an opinion upon ecclesiastical points. For example, there is a letter of Charles the Sixth of France, thus entitled, “touchant l’heresie du *Tyrannicide* soutenue par le “Docteur Jean *Petit*.” *Nouv. Traité de Dipl.* vol. vi. p. 47. This Doctor *Petit* openly maintained, in the schools of Paris, the following position: “Quòd quilibet tyrannus potest, et debet licitè et meritoriè, occidi per quemcunque vassallum suum vel subditum.” *Ibid.* p. 49.

[a] By 5 Rich. II. st. 2 ch. v. the sheriff is empowered to apprehend public preachers of heresy, but no punishment is specified. See however Fox’s *Martyrology*, vol. i. p. 575, et seq. who asserts, that this statute never received the assent of the Commons.

[b] P. 511.

[c] P. 11.

[d] Bishop Burnet, in his *History of the Reformation*, says, that Henry the

one in the statute which is in the Latin language, and directs
 “all heretical books [e] to be brought to the ordinary; that no
 “one shall presume to preach without his licence; that, upon
 “suspicion of heresy, he may imprison and interrogate such he-
 “retick; and, upon conviction and refusing to abjure his heresy,
 “that he shall be delivered over to the secular arm, which is
 “to inflict the punishment of burning, *coram populo, in eminente*
 “*loco* [f].”

It is a well-known rule in the construction of statutes, that the best key to the understanding of them is to inquire what was the established common law before the new parliamentary regulations took place. There is, in the appendix to the sixth volume of the State Trials, a short treatise concerning the ancient method of proceeding against hereticks in this country, whom the learned author supposes to have been punished capitally [g]. I must beg leave to question this opinion, however, as well as the manner of his considering the fifth of Richard the Second, which is the first statute that relates to heresy. I have,

the Fourth, in gratitude to the clergy who had raised him to the throne, granted them this law to *their heart's content*, vol. i. p. 24.

[e] This must probably have been aimed at the books of *Wycliff*, the principal of which, we find by *Rymer*, was entitled *Triologus*: those who may have curiosity to examine further into his doctrines, will find them fully stated in the *Decem Scriptores*, p. 2648.

[f] Bishop Burnet informs us, that, notwithstanding this injunction to the sheriff to proceed to the execution of the heretick, the king was advised by his learned counsel to issue the writ *De Hæretico comburendo*. We find, in *Rymer*, an order in the year 1214, and sixteenth of King John, *De Hæreticis in Vasconia extirpandis*; strong expressions are used in this writ, as *penitus extirpare, et nequitiam detestabilem funditus confundere*: but it may be doubtful, whether it empowered the officer (*who is the seneschal of Gascony*) to inflict a capital punishment; nor can it be inferred (but by presumption), that such a writ ever issued from this king in England.

[g] See also *Hobbes's Works*, p. 466, et seq. as also p. 629, et seq.

in the note below, mentioned the first order in Rymer, concerning the punishment of this crime, wherein the expressions used are too figurative and uncertain to argue from; besides this, it is directed to the seneschal of Gascony, and not to any sheriff, or civil officer, in England. I do not find any further mention of heresy in Rymer, till the year 1380, and fortieth of Edward the Third, in which a writ issues to the bishop of London to *permit him to imprison* a person convicted of this offence, *till he should abjure*, which does not even allude to burning, or any other capital punishment [b]. As for the statute of the fifth of Richard the Second, I have read it with great attention; and cannot possibly draw the same inference from it which the writer in the State-Trials doth. He supposes, that in order to punish a heretick under this statute, it was necessary to summon a convocation, which being often highly inconvenient, the present act of parliament empowered the ordinary to try this offence. Now it is clear, by the writ above-cited of the year 1380, that the bishop alone could convict, but wanted the assistance of the king, or secular judge, to punish; and as for 5 Rich. II. ch. v. it recites, "that the terrible consequences of heresy had been considered by the archbishop of Canterbury and the convocation," but by no means confines the conviction to a convocation assembled; the trial therefore was to proceed as before. Sir Edward Coke, moreover, in his third Institute, treating of the crime of heresy, gives it most clearly as his opinion, that the fifth of Richard the Second is not to be considered as a statute, it wanting the intervention of the Commons.

But the strongest argument, against hereticks being punished capitally by the common law, arises from the present statute, as

[b] There is a Scotch statute against heresy in the reign of James the First of Scotland, A. D. 1424, which directs that the bishop shall inquire into the offence, and be assisted by the secular arm.

it

it directs the criminal to *be publicly burnt* [i], which, if it had been a known punishment by the common law, would have been so recited; and then indeed the whole statute would have been in a great measure nugatory. The clergy, armed with this new power, did not long suffer this act to continue a dead letter, for *Thorpe* was tried within five years of its passing, and the chaplains and clergy, who attended the archbishop, conceived that they had now not only power to burn, but to drown a heretick, and absolutely advised this latter method of punishment [k].

In confirmation of what I have here advanced, the writ which issued for the burning of *William Sawtree*, who was the first that suffered for heresy, makes no mention of its being agreeable to the ancient law [l]; whereas, in the time of James the First, we find

[i] A writ, in Mr. Petyt's Collection of Manuscripts, adds, *realiter*, which direction was probably to prevent the humanity commonly shewn by executioners to strangle first, and burn afterwards.

[k] State Trials, vol. i. p. 36.

[l] This writ was drawn up by the two houses of parliament. See the lately printed Rolls, vol. iii. p. 459. 2 Hen. IV.

In the *Plowman's Tale* (commonly ascribed to Chaucer) are the following lines relative to the prosecutions of supposed hereticks:

“ These * han more might in England here,
 “ Than hath the king, and all his lawe;
 “ They han purchasid such powere,
 “ To taken hem whom list nor knawe;
 “ And say that heresie is there sawe,
 “ And so to prision wol hem sende,
 “ It was not *so* by elder lawe,
 “ God for his mercy it amende.
 “ The kinges lawe wol no man deme,
 “ Angerliche without an answer,
 “ But if any man these misqueme,
 “ He shall be baitid as a bere;

* Viz. the Clergy.

Z z 2

“ And

find this addition [*m*], which possibly may have contributed to the opinion that such a punishment had been so long known in this country.

In the year 1673, it was debated in the House of Commons; whether this writ should not be abolished [*n*]; and a bill for this purpose followed four years afterwards.

How happy is the situation of an Englishman at present, that he can consider this terrible process as a matter of speculation, and calmly amuse himself with it as a common point of learning, or antiquity! The thunder-cloud is now removed to a safe distance, whilst it becomes a matter of disquisition and curiosity, mixed with a pleasing terror.

“ And yet well worse they wol him tere,

“ And in prisson wollin him pende,

“ In gines and in other gere,

“ Whan that God woll, it may amende.”

[*m*] There is a writ in Rymer, of the year 1410, and the eleventh of Henry the Fourth, which recites the burning a heretick to be agreeable to the *ancient canon law*: but this could not become the law of England, till the present statute had adopted it. This early instance of punishing a heretick capitally is rather surprizing, as Joseph Scaliger informs us, he was told by *Cujas*, the great French lawyer, that he was present at the first execution of this sort at Rome. Scaligerana, p. 102. From these circumstances, it could not well have happened before the time of Henry the Eighth.

[*n*] See Anchtell Grey's Deb. vol. ii. p. 454.

STATUTES MADE AT WESTMINSTER,

4 Hen. IV. A. D. 1402.

THESE statutes, which amount to the number of Thirty-five chapters, relate to their miscellaneous matter. The 2d chapter, after reciting *les entiers coers et les grandes natureffes*, which the clergy of England had borne to the king, confirms all their rights and privileges; but at the same time directs, that the words *insidiatores viarum et depopulatores agrorum* (inserted in the petition of the clergy preferred to the king in this parliament) should not henceforward be used in any indictment, and particularly, that if any clerk is so prosecuted, he shall be immediately entitled to the benefit of clergy. This part of the statute would be absolutely unintelligible, was it not for the explanation which Sir Edward Coke hath given us^[o]: *insidiatores viarum* were hereticks, who pasted up their notions and doctrines in the highways; *depopulatores agrorum* were those who suffered the glebe to continue unimproved, and the parsonage-houses to go to ruin and decay, this being supposed to tend to *the depopulation of the country*.

I should, from this explanation of the words by Sir Edward Coke, suppose, that the new reformers, being persecuted by the regular clergy, had not rested merely on the defensive, but had prosecuted, in their turns, their persecutors by indictments at common law. The clergy attacked the reformers as *insidiatores viarum*, and the reformers carried on counter-indictments against the clergy as *depopulatores agrorum*, who did not repair dilapidations in their parsonage-houses. This, at least, is the only light that I can pretend to throw upon this very obscure law.

[o] Third Institute, p. 41.

The 11th chapter recites the great decrease of fish in the Thames, and other rivers, by feeding hogs with the fry caught at the wears, which seems to be a very singular preamble. There is, however, an Irish statute of Charles the First, which does not permit any hogs to be kept near the sea-coast, *because they are said to destroy the spawn*; which is much more probable than that they should be capable of getting at the fish themselves. Be this as it may, the smaller fry of the Thames are used at present to make artificial pearls with the scales; and perhaps it is better that the fish should diminish in number than that we should lose so valuable a manufacture. It is indeed very doubtful whether any of the game-laws tend in reality to the increase of either fish or fowl; and it is remarkable, that in Cornwall, where these regulations are not put in execution, they have more partridges than perhaps in any other county of England. The latest statute, however, with relation to the game, should be most strictly observed, as it preserves the farmer's grain from trespasses till the harvest is over.

This collection of statutes closes with some very severe laws against the Welsh [p], which were occasioned by Richard the Second's having been well received in Wales on his last return from Ireland [q], and also by the rebellion of Owen Glendower.

From the noble and most truly poetical ode, which was occasioned by the massacre of the bards under Edward the First, it

[p] The English at this time held the Welsh in great contempt: the bishop of St. Asaph had, in this parliament, advised the lords not to irritate them too much; who made answer, "*Se de illis scurris nudipedibus non curare.*" *Lel. Collect.* vol. ii. p. 31. 311.

[q] See a collection of *ancient pieces touching Ireland*, printed at Dublin in 1757; and, amongst these, *the story of Richard the Second being last in Ireland*, written by a French gentleman, who accompanied him in that voyage, and translated by Sir Geo. Carew.

hath

hath been generally conceived[r], that these laws of severity were preceded by others still more rigorous during that king's reign. I have already had occasion to make some remarks on the statute of Roteland (or more properly *Rbydlan*) in the tenth year of Edward the First, by which nothing more seems intended than to establish a thorough union both of laws and people. I do not mean by this to assert, that no severity was used by the conqueror of Wales; Lewellin, their last prince, complains of the English oppression in the most feeling manner: "Nam nos
 " adeo spoliati eramus, immò in servitutem redacti per justici-
 " arios et ballivos regis, amplius quam si Saraceni essemus, vel
 " Judæi. Denunciavimus domino regi, sed semper mittebantur
 " justiciarii et ballivi ferociores, et crudeliores, et quando illi
 " saturati erant per injustas exactiones, alii de novo mittebantur
 " ad populum excoiandum, in tantum quod *Wallensis malebat mori,*
 " *quam vivere*[s]." Besides this proof of oppression, a history of his own family, written by Sir John Wynne of Gwedir[t], authorises the supposed tradition of a massacre of the Bards; nor could the writer of that most admirable ode have made

[r] Humphrey Llwyd (who is generally very accurate in what relates to the history of Wales, or its antiquities) in his *Commentariolum*, falls into this common mistake. Speaking of the conquest of Wales by Edward the First, he says, "constitutis legibus, ne Cambri libertatibus et immunitatibus (quas Anglis ipse et sui posterii concessere) gauderent," p. 75. He likewise supposes that Henry the Fourth, after the rebellion of Owen Glendower, made a statute, that no one, either in courts of justice, or their schools, should use the Welsh language, p. 76. No traces of any such law are to be found in the Statute-book. Edward the First is likewise charged with having destroyed all the chronicles and public records in Scotland after his conquest of Scotland. See this, however, very ably refuted by Sir David Dalrymple, in a very learned treatise upon the supposed antiquity of the *Regiam Majestatem*. Edinburgh, 1769, 4^{to}. p. 12.

[s] Appendix to Wynne's History of Wales.

[t] Published for B. White, 1770, 12^{mo}.

his

his bard so warmly express, or his reader feel, the tyranny of Edward, if he had not probably raised an indignation in his own breast by reading of other materials, which I have not happened to meet with. I would only say, that we have no proof of oppression to the Welsh in our statute book [u] till the present laws.

The 27th chapter directs, that there shall be no *weflours*, *rymours*, *miniftral*, *ou autre vagabonde*, *pur faire kymortha*, *ou coilage*; which, as it hath not been translated, except in part by Rastell who leaves *kymortha* as he found it, I shall render “*waster* [w], “*rhymmer*, *minstrel*, or other *vagabond*, to make assemblies or “collections.” As for the word *kymortha*, it is plainly Welsh, but improperly spelt, as there is no such letter as *k* in that language [x]. The common glossaries take no notice of this term; upon looking into Richard’s Welsh Dictionary, however, I find the word *cymmorth*, which he renders, *help*, or *assistance*. I am informed also that *cymmorthau* is the regular plural of the term *cymmorth*, and therefore the statute seems to forbid tumultuous assemblies of the Welsh, under the pretence of mutual aid [y].

[u] There are some statutes of the second year of this king, with regard to the Welsh; but they cannot be considered as laws of extraordinary rigour.

[w] A player at *wasters*, signifies a *cudgeller*. Minshew; but an ingenious correspondent supposes, that it rather signifies a *wrestler*, from the *waist* or loins.

[x] A correspondent, however, hath lately informed me, that the letter *k* began to be used in Wales at the end of the twelfth century.

[y] In the collection of these ordinances by Rymer (vol. iii. part iv. p. 199), this word *cymortha* is spelt *comortha*; and in the same clause, which differs in many particulars from that in the statute-book, the Welsh are afterwards permitted to make *comorthas resonables*, which favours the sense in which I have explained this word. There are likewise some chapters of these ordinances in Rymer, which are not to be found in the statute-book. The *Nova Statuta* (printed by Pinson) uses the word *comonvaes* instead of *kymortha*.

It

It appears by the laws of *Hoel Dda*, that there were good political reasons for abolishing the Welsh bards and harpers, as they were the Tyrtæuses upon every expedition against the English [z]: “Quandocunque musicus aulicus iverit ad prædam cum domesticis, si illis *præcinuerit*, habebit juvenum de prædâ optimum; et si acies sit instructa ad prælium, præcinat illis canticum vocatum *Unbenjaeth Pridain* (five Monarchia Britannica) [a].”

The

[z] “Phillipe Auguste chassa de ses etats les jongleurs, les farceurs, les comediens, les baladins, et les *joueurs d'instruments*.” Hist. Litt. de la France, t. ix. p. 5.

[a] L. i. c. xix. The notes to Hoel Dda's laws give us no light with regard to this old British song, nor have the modern Welsh harpers any tradition of an air so entitled. The best and most ancient tune, which they have still retained, is called *Morfa Rhudlan*, where the Welsh received a great defeat: the melody is plaintive and good. Chaucer, in the Prologue to the Miller's Tale, mentions a tune called *The King's Note*, which seems to have been well known at that time:

“And after that he songe the *Kynge's Note*,

“Full oft blessed was his mērie throte.”

The same poet likewise, in the *Frankleyn's Tale*, takes notice of the Welsh bards singing to their harps:

“These old gentill Britons in her daies,

“Of diverse adventures maden laies;

“Rimed first in her mother tongue,

“Which laies with her instrument thei songe.”

The instruments used by the English, in Chaucer's time, were the *Ribible*, *Geterne*, and *Sautrie* (see the Miller's Tale); and it should seem that a player upon them attended at most of the *brew-houses* as they are called by Chaucer, for the entertainment of the guests, as the harpers continue to do in Wales at present. The English lover likewise serenaded his mistress.

The kings of England had, in the first year of Queen Mary, both harpers and bagpipers in their band of musick, with a salary of 18*l.* per ann. The two harpers, musicians to this queen, were not Welsh-

A a a

men,

The army being preceded at its onset by a bard, or singer of a particular song, is not peculiar to the Welsh. William of Malmesbury says, that before the battle of Hastings, on the part of the Normans, "Tunc cantilena *Rollandi* inchoata, ut martium viros exemplum pugnatueros accenderet [b]." We likewise find, that amongst the northern nations, the Scaldi were to advance before the troops: perhaps the song of *Britons*, *Strike Home*, might have its effect in animating a modern army, if the noise of artillery and fire-arms would not soon drown all inferior shouts.

Bishop Nicholson, in the appendix to his Historical Library, hath given us some curious particulars with regard to the Irish men, as far as can be collected from their names; nor was the bagpiper a Scotchman. See *Mf. penes Soc. Antiq.*

[b] L. iii. p. 101. But the more complete account is in Higden's *Polychronicon*, Gale; vol. ii. p. 286. *Muratori* cites a passage from an old Italian chronicle, which proves that this song of Oliver and Rowland was not only used by armies on an onset: the chronicler speaks of a stage, which was erected at Milan, "super quo historines cantabant, sicut modo cantatur de *Rolando*, et *Oliverio*." *Antich. Ital.* vol. ii. p. 6. Napoli, 1752, 4^{to}. Monsieur de la *Curne* hath also cited some ancient verses, from a romance entitled, "De *Rones*, autrement appelé les Ducs de Normandie;" which shew, that those who repeated military and historical songs, were in great request with the nobility of those times:

"Mais je sai aussi bien conter,
 "Et en Romauntz, et en Latin,
 "Aussi au soir, et au matin,
 "Devant Contes, et devant Ducs;
 "Et si refai bien faire plus,
 "Quant je suis a cort ou a feste,
 "Car je sai *chanson de geste*."

Mem. Acad. Inscript. vol. xiv. p. 582.

bards,

bards, whom he represents as having obtained great part of their lords lands, and who were likewise, upon all occasions, very disorderly. Baron *Finglaff*, who wrote in the time of Henry the Eighth a *Breviate of Ireland* [c], proposes not only severe regulations against rhymers and minstrels, but also against the *shamnabs*, who, it seems, were the Irish genealogists. Hollinshed, in his Chronicle, likewise informs us, that the Irish bard, if he was not well paid for his panegyric, turned libeller immediately; and if his audience was not attentive to his musick or poetry, that he commanded silence in the most imperious manner.

Notwithstanding these statutes of Henry the Fourth, the bards and musicians continued in Wales, and had regular degrees in their science or profession, as we find by a very curious commission of Queen Elizabeth, which is prefixed to a collection of Welsh poems, published by the Rev. Mr. Evan Evans in 1764 [d]. This commission directs that those, who are not *real bards* and musicians, shall be treated as vagabonds: and by an ordinance of Cromwell, in 1656, any minstrel, or *fidler* [e], who shall be
making

[c] Amongst the pieces touching Ireland, published at Dublin, 1757.

[d] Printed for Doddsley, 4^{to}. Drayton, in his *Polyolbion*, speaking of a Welsh bard, says,

“That at the *Stethva* oft obtain’d a victor’s praise,

“Had won the silver harpe, and worn Apollo’s bays.” Song 4.

Schilter, in his *Glossarium Teutonicum*, under the article *BARDUS*, makes mention of, “antiquissimum collegium (at Strasburgh) der *Meister-sanger* (or masters, and chief singers),” which probably were the bards of Germany, who had likewise a regular institution.

[e] *Fidler* does not signify what we now understand by the word *player on the violin*; thus, in *Fletcher’s Knight of the Burning Pestle*,

“they say it is death for these *fidders* to tune their *rebecks*.”

Thus also in Shakspeare’s *Taming of the Shrew*:

“call me *fidler*;

A a a z

which

making musick in any inn, or tavern, or *shall ask any one to hear his musick*, is to be punished as a sturdy beggar.

The other parts of the statute, which relate to the principality, enact, that no Welshmen shall hold any offices in Wales, except they happen to be bishops; that they shall not have any castle, fortress, or house of defence [*f*]; and, by the 34th chapter, the marrying even a Welshwoman equally incapacitates an Englishman.

These must be allowed to be laws of rigour; other causes however, besides the rebellion of Owen Glendower, might possibly have contributed to those odious and disagreeable distinctions between the king's English and Welsh subjects.

Notwithstanding the Conquest of Wales by Edward the First, and his having introduced, in some measure, the English laws by the statute of Rhudhlan; yet perpetual incursion and depredations were made by the Welsh upon the adjacent English counties, which did not perhaps arise so much from hatred to the conquerors, as from its being customary, in all mountainous districts, till they are more thoroughly civilized, to invade their richer neighbours,

(suadet enim vesana fames)

who inhabit a more fertile country. When the cattle are driven

which is applied to a lutanist. The violin seems not to have been known in England till the time of Charles the First; my authority for which is Anthony Wood, though I cannot recover the page that contains the passage I allude to. It seems to have been borrowed from the old Welsh instrument, called a *crwth*; which is not however tuned in the same manner with a violin, nor are there above two or three persons now in Wales who can play upon it.

[*f*] This part of the law was probably carried into execution, and accounts for there being no fortified houses, of any considerable antiquity, belonging at present to the gentry of Wales.

into

into the mountains, the attempt to recover them is attended with danger; and, if the pilferer is overtaken, it requires no small number of pursuers to bring them back with safety to the owner. We find this to prevail more or less in all parts: the mountain Arabs pilfer [g] from the inhabitants of the more level countries; the Tartars made the same depredations upon the Chinese, till the famous wall was built; and the Highlanders of Scotland [h] (if not yet thoroughly civilized by the wise laws, which both countries owe to the late Earl

[g] “Les Arabes s’en vantent de leurs voleries, comme d’une marque d’esprit.” Dapper, p. 295.

[h] There is amongst the *Black Acts* a law that does great honour to these Highlanders, which makes it a capital offence to rob their prisoner; and Lesly, the Scotch historian, says, “justice (amongst themselves) was so well established, that the *very rustles* might have guarded the cattle.” Which Diodorus Siculus mentions as a most exemplary proof of the same kind amongst the *Corfiacs*, τα τε προβαλα σημειοις διελημμενα, καὶ μηδεις φυλαττη, σωζειται τοις κελημενοις. Lib. v. c. 14.

In the boundaries between two countries, however, violence from one quarter naturally produces a return of the same rapine; and therefore we find, during the reign of Henry the Fifth, three different statutes for introducing better police into the county of Hereford, which, being bounded not only to the west by Radnorshire and Brecknockshire, but to the south by Monmouthshire (then part of Wales), seems to have wanted as many regulations as the Welsh counties complained of in the preambles to those statutes. There is, in Wilkins’s Collection of Anglo-Saxon Laws, one entitled, Senatus consultum de Monticulis Walliæ, which he supposes to have been regulations in the time of Æthelston. The first of these articles is, “De investigatione pecoris furtim ablati.”

Mountaineers also have not so early a regular system of laws. Thus the Cyclops, in the mountains of Sicily, are described by Homer:

Τοισιν δ’ αὖτ’ αγοραι, βεληφοροι, καὶ δὲ δερμεις.

Ἀλλ’ οἷγ’ ὑψηλῶν ὄρεων ναιεσι καρηνα

Ἐν σπεσσι γλαφυροισι, δελισευει δὲ ἱκασθ

Παιδων ἢ αλοχων ἔδ’ ἀλληλων ἀλεγυσι.

Odyss.

of Hardwicke) still continue the same incursions upon the Lowlanders [i].

I would not by this be understood to insinuate, that the mountaineer is born with a worse disposition than the inhabitant of the more level country; such depredations are at present called *pilfering*, as we term the captures by the Algerines *acts of piracy* [k]. We must recollect, however, that the Welsh, considering themselves as oppressed, and in a state of war, had never made any treaties [l] of peace with their neighbours, by which they undertook not to make short expeditions into an enemy's country; and for the same reason that the Algerines have never made any such stipulation with the Italian states.

The Mediterranean sea hath in most ages been infested with this kind of free-booter; for Nestor asks Telemachus in the *Odyfsey* (when he means to receive him with the greatest civility

[i] Blaeu, in his account of Ireland, says, that the inhabitants of the uncivilized parts "*latrocinaturi preces ad Deum fundunt.*" *De la Mo-traye* likewise, in his Travels through Crim Tartary, observes, that, previous to such an expedition, "*ils font une priere domestique pour de-mander à Dieu beaucoup de jeunes esclaves, qu'ils puissent vendre, en un mot, toutes sortes de bon butin. A chaque article de cette priere leurs femmes et leurs enfants respondent, Amen.*" vol. ii. p. 44. Hague, 1727, Folio.

[k] *Fynes Morryson* mentions (in his travels through Germany) that the English were, at the latter end of Queen Elizabeth's reign, much complained of as pirates, "for that which we calle *warre at sea*, and the *Royal Navy*, that, they terme *robbery and pirate-ships*; neither have they the patience to heare any justification or excuse." Part i. p. 37. London, 1617, Folio. This imputation could not escape that most general of all satyrists Joseph Scaliger, who had been in England. "*Nulli melius piraticam exercent, quam Angli.*" *Scaligerana*, p. 226.

[l] The Algerines observe the treaties which they enter into, perhaps, as well as some European powers.

and hospitality) whether he is a pirate; and Plato observes, *καὶ γὰρ Ὅμηρος τὸν Ὀδυσσεὺς πρὸς μητρὸς πατρὸς Ἀυτολόχον ἀγαπᾷ τε, καὶ φησὶν αὐτὸν ὑπὲρ πάντας ἀνθρώπους κεκῆσθαι κλεψίσυνη* [m]. Even the Generals of the civilized Athenians were by their laws obliged to take an oath to make incursions twice every year upon the Megareans, *δὲς ἀνα πάν ετος εἰς τὴν Μεγαρικὴν ἐμβαλλεῖν* [n]. Plutarch indeed, in his Life of *Pericles*, supposes, that this law was

[m] If the illustration of a law, by a citation from a poet, is objected to, my best answer will be (not to dwell on the authorities of Grotius, Pufendorf, and other great writers) that it should seem, from the oration of *Æschines* against *Timarchus*, the poems of Homer were alwas laid on the tables of the courts of justice, together with the Athenian laws, and that the clerk is frequently applied to by the orator to read both the one and the other. It is likewise mentioned by Diogenes Laertius, in his life of Solon, that a dispute between the Athenians, and the inhabitants of Salamis, was determined merely upon these lines from Homer's catalogue of the Grecian fleet:

*Αἶας δ' ἐκ Σάλαμινος ἀγὼν δυοκαίδεκα νηας,
Στήσε δ' ἄγων, ἴν' Ἀθηναίων ἰσάνῃο φαλαγγεῖς *.*

from which the inferiority of the inhabitants of Salamis at that time was inferred; and in the dispute with regard to the boundaries of France and Spain, which was settled between the two crowns in the last century, *Petrarch* the poet is cited. See Baluzius's Preface to the *Marca Hispanica*, Paris, 1668, Folio. Selden likewise refers to Chaucer in the important argument of the seas being free. It should seem that the authority of the Greek tragedians was also sometimes appealed to in the Athenian courts of justice, as there is a law (in Petit's collection) *ταῖς τραγωδίαις τῶν ποιητῶν Αἰσχυλῆς, Σοφοκλέους, Εὐριπίδου, τὸν γραμματεῖα τῆς πόλεως παραναγιώσκειν*. Lib. i. tit. i. And hence perhaps their tragedies are so full of moral sentences, the good or bad tendency of which was to be examined by the *Διονυσιακοὶ κριταί*, rather than they were to determine upon the merits of the poetry, as a pit does at present.

[n] Petit, Legg. Att. p. 21.

* These lines are said to have been foisted in by Solon on this occasion.

occasioned

occasioned by the *Megareans* having killed an Athenian herald; according to his account however it was inserted in the oath, which the Athenian generals were obliged to take when they first entered on their office: Τυς δε στρατηγες (εταν ομνυωσι τον παλρικον ορκον) επομνυειν, οτι και δις ανα παν ετος εις την Μεγαρικην εμβαλυσι [ο].

[ο] Vol. i. p. 168. ed. Francofurti, 1620.

STATUTES MADE AT WESTMINSTER,

5 Hen. IV. A. D 1403.

THE 3d chapter of this statute directs, that watch should be made on the sea-coast, in the usual manner, which I should not have taken notice of, was it not to introduce an order, which is cited by Prynne in his animadversions on Sir Edward Coke's Fourth Institute, shewing the stations commonly fixed upon for this purpose. Possibly such beacons might be of use[*q*] when an invasion is apprehended; and this book of Prynne's will not probably make part of a captain general or lord admiral's library. [*r*]. This,

[*q*] There is a still more singular provision (by a proclamation which issued in the twelfth year of Edward the Third) to give notice of an invasion. The sheriff is ordered to require "that in all churches upon the sea-coast
"no more bells than one shall be rung even on Sundays, or holidays;
"but that, upon seeing the enemy's fleet, they shall ring every bell belonging to the church." Petyt's Miscellanea, vol. i. p. 170. B. Thorn, in his Chronicle, also mentions a royal grant of a privilege *super pulsatione signorum*. The reason of this licence must have arisen from the bells being otherwise considered as giving a false alarm on a supposed sight of enemies. Dec. Script. 1797.

In Norden's Surveyor's Dialogue, one of the articles to be given in charge is, "At what Beacons Copyholders are to watch and ward." p. 122.

[*r*] It is, perhaps, as improbable indeed, that these Observations will ever make part of such a library.

"Ordinance pur sauvacon des pais de Kent et d'Essex, et nomement
"pur les villes esteantz sur la Ryvere de Thamysse, pur periles que
"soidenement leur purroit avenir pur noz enemys come Dieu defende,
"et auxi pur la sauvacon de la Navye esteant es portz du dit
"River.

"Primes, soit ordeine al Isle de Shepeye un Beken, et a Shoubery en
"Essex un autre Beken. Item, a Hoo en Kent un Beken, et a Fobbing

This, being the most obvious and simple method of giving intelligence, hath been practised from the earliest ages.

Homer compares Achilles, after he was armed and issuing to assist the Grecian army, to such a beacon burning in the night as a signal of distress in a besieged town; which is, therefore, not one of those similes *à longue queue*, ridiculed by Perrault, as every circumstance in the allusion is apposite and striking [s].

The Agamemnon of Æschylus likewise opens by a slave bringing the long-expected news of Troy's being taken, by having observed such a signal, which he had watched for many years.

“ en Effex un autre Beken. Item, a Cleve en Kent un Beken, et a Til-
 “ bery en Effex un autre Beken. Item, a Gravesend en Kent un Beken,
 “ et a Farnedon en Effex un autre Beken.

“ Item, qe par especial maundement de per nostre tresredoute Seigneur
 “ le Roy soient chargez as viscountz, constables, et autres ministres, et
 “ avantdites parties de Kent et d'Effex, que tous les dites Bekens soient
 “ hastivement et convenablement as lieux avantnommez appareillez et par-
 “ faitz, pur sauuation des pays avandits, et pur la dite navye.

“ Item, qe tantost qe les dites Bekens soient faites, qils soient bien et
 “ convenablement veillez, sibien de jour come de nuyt sanz faut.

“ Item, qe les veillours qe pur le temps ferront as dites Bekenes, et
 “ nomement as Bekenes de Shepeye, et Shoubery, soient de temps en temps
 “ garniz et chargez, qe ausitost qils purront espier aucunes vessels d'ennemys
 “ venantz ove feil ou ores devers la dite ryvere, fitost les ditz leur Bekenes
 “ de Shepey et Shoubery soient mys a fum, en fesantz ovesque ce signe la
 “ noise de corn et de cri qils purrent faire, pur garnir la païs environ
 “ pur venir ove leur force au dite ryvere, chescun en focours d'auters pur
 “ contester leur enemys.

“ Item, que les païs avandites soient garniz et amonestez sur grevouise
 “ peine que tantost qils veient les dites Bekenes, ou les unes de eux mys a
 “ fum, ou qils oient la noise de corn ou de cri, quils vieignent prestment
 “ de leur meillour arraie d'armes tanque au dit ryvere, pur sauver les
 “ villes esteantz sur ycel, come la navye esteant es portz, sans damage
 “ de nos enemys.”

[s] See Iliad Σ. ver. 298.

Even

Even so late as the reign of Q. Elizabeth, Sir *William Brook* erected beacons on the coast of Kent, when the Spanish Armada was expected.

Mr. Keate [t] likewise informs us, that they are used to this day by the Republic of Geneva; and Rouviere takes notice, that they generally consist of large piles of wood ready to be lighted, and communicate the alarm [u].

The 5th chapter makes it felony to cut out the tongue, or pull out the eyes, of the King's liege people; offences recited to have been daily practised; and probably from the growing animosity between the houses of York and Lancaster. The Coventry act (as it is called) of Charles the Second passed, indeed, at a time when parties ran high; but that was a single instance of such a maim; nor did the preceding civil wars produce any such proof of horrid barbarity. Amongst the persons wounded at this time, Richard Chedder, who was a servant or officer to Sir Thomas Brook, knight of the shire for the County of Somerset, had been beat and *blemished* [w]: the 6th chapter therefore directs, that the person guilty of the offence shall surrender himself to the judges of the King's Bench; and that, if any such assault is made upon the servant of any other member of parliament, the same remedy shall be given to the party injured.

There are two or three particulars in this short chapter which deserve notice; the first is, that Richard Chedder is styled *Escuyer*, and yet was a menial servant to Sir Thomas Brook; the next is, that the assailant is styled John Salage *otherwise Savage*, which is

[t] In his account of that Republick.

[u] Travels, p. 132. See also a map where the places for these signals are marked, in Lambard's Perambulation of that county.

[w] In the original, *emblemiz*. This maim of Chedder's is much dwelt upon in the debates of the House of Commons on the *Coventry Act*. See Ancht. Grey's Deb. vol. i. p. 342, et seq.

the first precedent that I find of the *alias* being used; and it is to be remarked that the statute of *Additions* [x] passed the following year [y]. Lastly, this is the first instance of privilege of parliament being mentioned in the statute-book; and it should seem that it was meant only to extend to members or their servants, *whilst the parliament continued to sit*, as in the preamble it is recited, *que le dit horrible fait fut faict deins le temps du dit parlement* [z].

The 15th and last chapter contains a general pardon, which I would not have observed upon, was it not to say, that the authors of the Parliamentary History have, without cause, objected, that it does not make mention of the most essential and necessary word, *that of treason*. There is likewise another particular which deserves notice, that Richard Salage, upon surrendering himself, is to make satisfaction either by the award of the court of King's Bench, or by a jury; an alternative of which I do not recollect any other instance.

It seems also to be a mistake in most historians, who take notice that the parliament, which assembled the following year,

[x] Shakspeare uses the word *addition* in its true legal sense,

“Where great *addition* swells, and virtue none,

“It is a bloated honour.”

All's well that ends well.

[y] One reason for passing such a statute might have arisen, from its having been a common practice, during the civil wars of this time, to change the surname for the purpose of concealment. Thus the *Blunts* of Lancashire took the name of *Brook*; the *Carringtons*, that of *Smith*, &c. Fuller's Worthies, p. 51. By the laws of the state of Lucca, if any one change his name, he is to be heavily fined; and, if he cannot pay such mulct, his tongue is to be cut off. St. Lucc. c. lxxxviii.

[z] Parliaments then sat but for a few days; those, who have a curiosity to see how many, may consult Prynne's *Brevia Parliamentaria Rediviva*: the parliament of the seventh of this king having continued their session nearly a year, it was matter of complaint on account of the payment of the wages.

was the famous *Parliamentum Indoctum* [a], from which the lawyers were excluded; as there is no summons to be found in *Dugdale* for the year 1404, but on the contrary for 1403 when this statute passed: and this observation seems to be confirmed by the unusual alternative, given either to the judges or jury, to assess damages by the 6th chapter of this statute, which I have before observed upon. Carte supposes that the great reason, for the lawyers pushing in shoals to become members of parliament, arose from their desire to receive the wages then paid them by their constituents, whilst from their profession they were obliged to be resident in London, whereas other members could not attend but with a considerable expence [b].

It is very extraordinary that *Fortescue*, who wrote his treatise *De Laudibus Legum Angliæ* so soon after this statute, should not have taken notice of this exclusion [c]. I should imagine that it

[a] "Rex brevia direxit vicecomitibus, ne quosdam pro comitatibus eligere qui in jure regni docti fuissent." Tho. Walsingham, p. 371. Stowe says it was called the *Layman's Parliament*.

[b] Vol. ii. p. 481.

[c] Whitelock supposes that the lawyers were excluded by the crown, who apprehended opposition from them: this however is contradicted by what he mentions previously, p. 357. He likewise adds, that those who will have a *nolimus* of learned senators, must have a *volumus* of uncouth laws. Comm. on Parl. Writ, vol. ii. p. 361. 366. London, 1766. Pride the Drayman used to say, that it would never be well, till the lawyers gowns (like the Scottish colours) were hung up in Westminster-Hall. Fab. Phillips on Capias's, and process of Outlawry, p. 316.

A proclamation issued on the 6th of November, and twentieth year of the reign of James the First, in which the voters for members of parliament are directed, "not to choose curious and wrangling lawyers, who may seeke reputation by stirring needless questions."

"A prating lawyer (one of those which cloud

"That honour'd science) did their conduct take;

"He talk'd all law, and the tumultuous croud

"Thought it had been all gospel that he spake.

"At

it arose not from contempt of the common law itself, but the professors of it, who, at this time being *auditors* to men of property, received an annual stipend *pro consilio impenso et impendendo*, and were treated as *retainers*[*d*]. Chaucer, in his character of the Temple Manciple, says,

“Of masters had he mo than thryis ten

“That were of law expert, and curious,

“Of which there were a dozin in that house,

“Worthy to ben ftuards of house and londe,

“Of any Lord that is in Englonde.”

It should seem hence, that the great preferment, which advocates at this time chiefly aspired to, was to become steward

“At length these fools that common error saw,

“A lawyer on their side, but not the law.

Aleyn's Hen. VII. p. 103. London, 1638, 12^{mo}.

[*d*] The first mention, which I have happened to meet with, of a barrister's being a knight, is in the third year of Henry the Sixth, when Sir Walter Beauchamp, as counsel, supported the claim of precedence of the earl of Warwick against the then earl marshal at the bar of the House of Lords. Mr. Roger Hunt appeared in the same capacity for the earl marshal. The whole proceedings and arguments in the English of the time have been copied by Mr. Petyt from the parliamentary roll; it fills five and twenty pages, and is a most curious record. Petyt, Mss. vol. Z. p. 146, et seq. Both advocates, in their exordium, make most humble protestations, entreating the lord, against whom they are retained, not to take amiss what they should advance on the part of their own client.

There is, in Madox's Form. Anglican. the form of a retainer, during his life, of John de Thorp as counsel to the earl of Westmorland: and it appears, by the *Household Book* of Algernon fifth earl of Northumberland, that, in the beginning of the reign of Henry the Eighth, there was in that family a regular establishment for two counsellors and their servants.

Saintfoix informs us, that, upon a dispute between the lawyers and the military in Turkey, with regard to precedence, the Grand Signior declared, that the left hand would be the most honourable post for the former, and the right for the latter. T. i. p. 167.

to some great man. It is probable that the profession of the law, not ennobling their posterity in other parts of Europe, arises from the same cause: such descendants are not at this day so considered in *Germany*, nor were they anciently in *France*, as it required the intervention of the parliament of *Paris* to ennoble the son of the famous advocate *Le Maître*. *Voltaire*, after mentioning this, says, *C'est un reste de l'ancienne barbarie, d'attacher de l'avilissement à la plus belle fonction de l'humanité, celle de rendre la justice.*

Mr. *Waller*, in the speech which he made on the impeachment of judge *Crawley*, expresses himself thus with regard to this famous exclusion, though the profession of the law hath not often the testimony of a poet to cite in its favour:

“ If you were not assisted by the judges, and the House of
“ Commons by other gentlemen of the long robe, experience
“ tells us it might run a hazard of being styled *Parliamentum*
“ *Indoctrum* [e].”

[e] *Waller's Works.*

STATUTES MADE AT GLOUCESTER,

9 Hen. IV. A. D. 1407.

THIS parliament was convened at Gloucester on account of a new rebellion, which the arch-rebel, Owen Glendower, had raised in South-Wales.

The 1st chapter of this law confirms all liberties and privileges granted by the king, either to the clergy or laity, except some late franchises to the university of Oxford; and this exception is anxiously repeated by the 1st chapter of the thirteenth year of this king. I cannot find what might have occasioned this [f], and leave it to those who are better versed in the antiquities of this great University [g]. It is the more remarkable, as Henry the Fifth is said to have been educated at Queen's College in Oxford; and the apartments, in which he lived, were commonly shewn to the curious stranger, till the old gateway was pulled down within these few years, to make room for the new wing of building, which hath now completed the college. The University might, therefore, have expected support from their illustrious academick, instead of marks of the royal and parliamentary displeasure; were not the irregular sallies of his juvenile years, perhaps, attributed to a want of attention to his education, whilst the prince resided there. The University of Oxford is not much indebted to the kings of England [b] for their munificence and

[f] By 8 Hen. V. ch. ix. certain scholars are banished from the University of Oxford, on account of riots and disturbances.

[g] Wycliffe's doctrines were well received in that University, which might make them obnoxious to *Thomas Arundell, Archbishop of Canterbury*.

[b] The king of Denmark, in the year 1622, made a regulation for the encouragement of the University at Copenhagen, "Ne quis exteras adiret Academias, nisi primâ Philosophiæ laureâ *Hafniæ* foret re-dimitus." *Messenii Chronologia Scandiana*, t. v. p. 9.

benefactions,

enefactions, if we except perhaps *Ælfred*; nor do I recollect any instance of parliamentary favour, if the not allowing the last Mortmain act to extend to the two Universities may not be considered as such [i].

After all, perhaps, royal benefactions may often rather prove detrimental than beneficial, if not in the infancy of such establishments, and then most discreetly dispensed, which is not often the case. If an argument may be drawn from the encouragement of the elegant arts to the promotion of science; it is very remarkable, that the French school hath not produced any very capital painters since the expensive establishment by Lewis the Fourteenth of the academies at Rome and Paris. A hot bed, in the garden, may produce more luxuriant plants than the natural soil; but the too sumptuous encouragement does not seem to contribute to the production of the more exalted genius, who

“ nascitur, et non fit.”

I do not meet with any more laws of this king which it is necessary to observe upon [k]; if it be not the 7th chapter of the 13th year of his reign, which directs, that rioters may be arrested by the justices of the peace, and that, together with the

[i] Monconys informs us, that the privileges of the university of Salamanca are so extensive, and sacred, that, if a scholar thereof commits a murder at Madrid, he must be sent there to take his trial, the president of the university being also his judge. T. ii. p. 10. It should seem, that learning was formerly considered as a kind of commodity which the king could forbid or license the exportation of, as Henry the Fifth gives special permission to Richard Seutesham, Bachelor of Divinity, to teach scholars at Paris. See Rymer, vol. iv. part ii. p. 8. A. D. 1414. 2 Hen. V.

[k] In the fourth chapter of the 9th year of Henry the Fourth, which relates to felonies in Wales, *lettres de marche* is most improperly translated *letters of marque*; it means a letter of *marche*, already expounded to mean the confines of the two countries.

sheriff, they must transmit a certificate of their offence within a month to the king and council, which are to be of *as great force* as a presentment by a jury. This seems to be the first instance of giving very extraordinary powers to justices of the peace, for the punishment of crimes, without the intervention of a jury, which was carried so much further by *Empson* and *Dudley* in the reign of Henry the Seventh.

I am now to consider this king as a legislator; and I do not find any exceptionable law of his whole reign, except the statute which I have above observed upon with regard to heresy. His title to the crown was far from being a clear one: Sir Robert Cotton says of him [1], "Now succeedeth a man that first studied a popular party to support his title;" and it hath been often said, that the *worse title*, the *better king*, of which Richard the Third is by some considered to be an additional proof. Mr. Cay, in his preface to the Statutes, hath strongly combated this notion: an attention, however, to the points desired and wished by the people, seems to be a necessary consequence in him who wants their support.

Grafton [m] indeed asserts, that Henry raised supplies without the intervention of the commons, and that he likewise interfered in the election of members of parliament. I do not find the least traces for this in the laws themselves; and, on the contrary, by the 15th chapter of the seventh of Henry the Fourth, provision is made for the more free election of the knights of the shire, which in a great measure, before this, depended upon the sheriff [n], who was the king's officer.

To fix the merit of this king as a legislator, he had the spirit to insist upon and enforce the wise statutes of *Provisors* made by

[1] Posthuma, p. 28.

[m] Grafton, p. 22.

[n] See the preamble to 7. Hen. IV. ch. xv.

Edward the Third, with a freedom, and warmth of expression, which one could hardly expect to find in the statutes of a country that still continued to be of the Roman-catholic persuasion: "Sur la grevouise complainte faite a nostre Seigneur le
" Roi, par sa commune (en son parlement tenus a le fixieme jour
" d'Octobre, l'an de son regne fisme) del horrible malveise et dam-
" nable custume que est introduce de novel en la cour de Rome."

These expressions are, perhaps, as strong as can be found in any of the statutes of the reign of Henry the Eighth.

STATUTES MADE AT WESTMINSTER,

1 Hen. V. A. D. 1413.

THE first chapter of the statutes of this session regulates, both who shall be chosen representatives in parliament, and who shall be the electors. By the words of the law it seems to be a necessary requisite, that both the one and the other should be resident in the county at the time when the writ of summons issues (whatever may have been the parliamentary exposition) and that the residence intended was a personal one: "S'ils ne soient
"reseant dans les dites countees, ou ils ferront isint elus le jour
"de la date du brief de summons, que les elisours des chevaliers
"des countees soient aussi reseants en mesme la maniere." The same direction is afterwards repeated with regard to burgesses [o]; Sir Edward Coke, accordingly, in the short notes of his speeches inserted in the Journals of the House of Commons, expressly says, the meaning of this statute is, that the person chosen should be well known to the electors [p].

The 3d chapter is the first law that relates to the offence of forgery [q], which it punishes by satisfaction to the party injured, and

[o] By an Irish statute of Henry the Seventh, no one is to have an office in any town where he is not *resident*. Cox's History of Ireland, p. 188.

[p] Whitelock likewise gives it as his opinion, that reseancy is necessary in the electors by the words of this statute, though he admits that it hath of later times *been connived at*. Comm. Parl. Writ, vol. i. p. 496. He likewise mentions a doubt, whether the candidate can be chosen but by those who were present at the proclamation of the writ. Vol. ii. p. 25.

[q] Repealed 5 Eliz. c. 14.—Forgery was punished in Lorrain with banishment so long ago as the year 1398, and possibly in consequence of a still more ancient law:

and likewise a fine to the king. The expressions used in this branch of the statute are remarkable; “Diverses malveis persones, aucunes de leur tete demesnes, et aucunes par faux conspiracie et covyne, subtilement imaginent, et forgent *de novel* diverses faux faits et muniments, et les fount pronouncer, publier, et lire, *pour enveogler et chaunger les cœurs des bons gents du pays, et pour troubler les possessions et title des dites lieges.*” From which it should seem, that forgeries, at this time, were not so much intended to gain possession, as to give disquiet and vexation to their neighbours. The dissensions and civil wars occasioned many extraordinary instances of malice; another proof of which appears by a statute of the seventh year of this king, which recites, that there had been many indictments, laying the fact to be committed in places which were not to be found in the county, merely to harass, and give anxiety to those against whom such malicious prosecutions were carried on.

The 5th chapter is the known *Statute of Additions*, from which it should seem, that the people of this country had greatly increased, so as to make more particular descriptions of them necessary. *Fuller*, in his *English Worthies*, asserts, that these distinctions were not used, but in law process, till the latter end of the reign of Henry the Sixth; and that *John Golope* was the first person who assumed the title of Esquire [r]. He likewise supposes,

“En cette année consequemment,

“Furent for-jugés deux *Amans*,

“Et tous leurs biens, vendus a pris :

“*Fait avoient de faulx escrits.*”

Hist. de Lorraine, t. iv.

Ovid classes the offence with that of murder,

“Non ego cæde nocens in Pontica littora veni.”

— — — — —
“Nec mea subjectâ convicta est gemma tabellâ,

“Fallacem linis imposuisse notam.” *Ep. ex Pont. l. ii. ep. q.*

[r] We find, however, that by a statute of the preceding reign, one *Cbedder* is styled *Ecuyer*. It should seem, from *Keilwey's Reports*, that,
in

poses, that the rebellion of Jack Straw, and Wat Tyler, made the English gentry desirous of not being confounded with such contemptible levellers and rabble.

The 6th chapter enacts, that no Welshman shall take revenge against those Englishmen who pursued their friends and relations in the late rebellion; and, particularly, that they shall not imprison the English till they have proved (by what the statute styles an *Affach*) they were not guilty of killing, or wounding, the relations or friends of a Welshman. The law is, in itself, of a very singular nature, and the term *affach* is rendered, by Richards, *oath*; I cannot, however, find it either in Dr. Davis's Dictionary, or the Glossary to the laws of Hoel Dda[s]. The statute itself afterwards explains the word, agreeably to the signification in Richards, to be, *s'excuser de la mort*

in the time of Henry the Seventh, there were but two ways of becoming a *Gentleman*; viz. either by a grant from the king, or by executing particular offices. Keilw. p. 58. A. As so few could write their names at this time, it might be another reason for passing this statute of additions, and might also occasion that part of the ceremony, in the attestation of a deed, which makes it necessary to *seal and deliver*. Pocock, therefore, informs us, that the Egyptians authenticate instruments by sealing, because so few can subscribe their names. For the same reason, Edward the First (when prince of Wales) makes excuses for not sealing his letter with his own seal. See Rymer, vol. i. part ii. p. 70. Even so late as the year 1525, Adam Gordon earl of Sutherland and his countess subscribe their names *with a pen-led*; the earl's by Mr. Thomas Gadarur, Notary Public, as also that of the countess. This is extracted from the learned case prepared on the part of the countess of Sutherland, on an appeal to the House of Lords, A. D. 1770.

[s] Mr. Tate proposes it as a query to the Society of Antiquaries, which used to meet in the time of James the First, what was the meaning of the term *affach* in this statute: to this Mr. Jones, who appears to be much versed in the Welsh language and customs, answers, that he cannot pretend to interpret this word. See Hearne's Antiquary Discourses, p. 211 and 228.

par le serment de ccc hommes; and it could hardly be expected, that an Englishman, in a Welsh prison, could ever procure so many *compurgators*. The number, indeed, of these friendly witnesses, required by many of the ancient laws [1], both in *Lindenbrog* and *Baluzius*, must make the defence impossible, even to a native of the country, if we do not suppose that perhaps thirty only swore to the innocence of the person accused, and the other two hundred and seventy to support the credit of these thirty.

The 9th Chapter directs, that the revenues of Calais shall be employed in the maintenance of it. I have already had occasion to observe upon the increasing expence of the fortifications of this place; and, by a manuscript which I have before mentioned to be an account of the civil and military establishment in the first year of Queen Mary, the salaries of the officers of the garrison amounted to four thousand and thirty-six pounds, six shillings, and four-pence; at the same time that the expence of the queen's household was only fifteen thousand seven hundred and sixty-seven pounds, five shillings.

[1] "Vulgus in Sueciâ valde procinctum est ad compurgationis jurementum." Loccenii Leg. Provinc. It appears, by the 9th chapter of *Steirnbook's* learned treatise *De Jure Sueonum vetusto*, that the number of these compurgators bore some proportion to the value of the thing in controversy. If a man could produce so many witnesses to his character, it certainly was a great presumption in his favour. *Saxo Grammaticus* supposes, that this number of compurgators was first introduced upon the disuse of the trial by ordeal.

STATUTES MADE AT LEICESTER,

2 Hen. V. A. D. 1414.

THE 7th chapter of the statutes of this session against the hereticks, called Lollards, was but too sufficiently promulged in the same year, by the execution of nine and thirty of these reformers [u], and amongst the rest the famous Sir John Oldcastle. It is believed that the tenets of this sect were nearly the same with those of *Wycliff*; and when one enthusiast is followed by multitudes [w], some of the new converts generally set up for themselves, with, perhaps, some very trifling and immaterial deviation from the first fanatic, which, however, immortalizes them in the disputes of polemical divinity [x]. Sir Henry Spelman gives us the following account of the origin of this word: “Lollardorum nomen exortum est in Anglia, sub
“excessu Edwardi tertii. Dictos opinatur *commonachus Sti. Augustini Cantuar. a lolio*, quod, sicut lolium, inquit, segetes Domini inficerent. In sententiam ejus abiit *Lynderwodus*, sed perperam uterque. *Tritheimius* enim in Chronico ostendit, eos a

[u] Polychrynicon.

[w] I would not by this be understood to reflect upon the memory of *Wycliff*, which deserves to be venerated by every good Protestant.

[x] Some of these sects went so far as to ridicule the principal tenets of Christianity, as may be inferred from the old verses,

“Wit hath wonder, that reason cannot scan,

“How a moder is mayd, and God is man;”

which are said to have been made by *Peacock*, who, according to some accounts, was bishop of Chichester in the following reign. The answer given by the orthodox was,

“Leve reason, beleve the wonder;

“Belef hath mastery, and reason is under.”

“*Gualthero*

“*Gualthero Lollard Germano* quodam, qui floruit circa annum Domini 1315, originem duxisse [y].”

It is part of the directions of this statute, that certain officers, and amongst the rest the sheriff, shall swear that they will execute the law against the Lollards; and *Sir Edward Coke*, when he was made sheriff of Buckinghamshire, objected to that part of the oath, which obliged him to punish *Lollards*, saying, *he did not know what the term meant* [z].

Sir John Oldcastle, who was prosecuted on this statute, appealed to the king as supreme head of the church, which he declined; and Grafton [a], who mentions this circumstance, at the same time informs us, this sect had increased to such a degree the preceding year, that an act of parliament was intended to suppress all religious houses, which was dropped on account of the French war. These two fundamental articles of reformation were not, therefore, altogether new ideas in the reign of Henry the Eighth.

Those who may have curiosity to search for more particulars with regard to the first prosecutions on this statute, may consult Elmham's life of Henry the Fifth, published by Hearne, and

[y] I have been informed, that *Mosheim*, in his Ecclesiastical History, denies that any such etymology of the word *Lollard* is to be found in *Trithemius*; he, on the contrary, derives it from the German word *lullen*, or *lollen*, which signifies to sing in a low voice, and the common termination *bard*, with which many of the old German words are said to end. Chaucer, in the Squier's Prologue, however, calls this sect *Lollers*; and it should seem from the following lines, that the etymology from *lolium* was even then established:

“We levith all in the Grete God quoth he;

“He wolde sowne some difficulte,

“Or sping cockell in our cleane corne.”

[z] Fuller's Worthies, p. 141. Sir Edward Coke's objection was the occasion of leaving out that part of the sheriff's oath which relates to the Lollards. Whitelock's Annals, Ms. penes Dr. Morton.

[a] In his Chronicle, p. 34. B.

D d d

likewise

likewise Bale's account of Sir John Oldcastle, as well as most of the Chroniclers of the time; who, being generally monks, are excessively lavish in their praises of this law. Henry the Fifth himself might, in his younger days, have been inclined to libertinism; but one need only read his will in Rymer, made in the third year of his reign, to see that he was now become excessively devout, and that he might be inclined to support the clergy in this statute of persecution. In the sixth year of his reign, he obtained a licence from the pope to carry about with him *altare portabile* [b]; it appears also, that he was particularly licensed to prostrate himself before this altar when the day did not yet appear [c].

I do not find any more statutes of this king which require any explanation; his reign was so short, and so much of it taken up, either in preparations for war, or actual campaigns, that much is not to be expected from him as a legislator. The laurels which he acquired are well known; but he hath left us, in a preamble to one of his statutes [d], a most irrefragable proof, that they were not obtained but at the dearest price, *the depopulation of the country*. The king is thereby permitted to appoint sheriffs for four years, because it is recited, "*that by wars and pestilence there are not a sufficient number remaining, in the different counties, to discharge this office from year to year* [e]." The present statute is a law

[b] Rymer, vol. iv. part iii. p. 63.

[c] Ibid. The pope's reason for granting this as a special favour and indulgence is the following:

"Quia cum in altaris officio immoletur Dominus noster Jesus Christus, Dei filius, qui candor est lucis æternæ, congruit hoc non tenebris fieri, sed in luce."

"Verba morituri Henrici 36 anno ætatis suæ." "Good Lord thou knewst that my minde was to reedifie the walles of Hierusalem." Let. Coll. p. 489. 2 Ed.

[d] 9 Hen. V. ch. v.

[e] He also brought himself into infinite distress by carrying on the war

a law of persecution; and the number of consequential executions, which he seems to have at least permitted, if not promoted [*f*], should be remembered by every friend to civil and religious liberty, as long as the battle of *Agincourt*.

war with greater expence than we have any account of in the former reigns. (See Rymer, in the years preparatory to his expeditions. (After which generally follows a pledge of the crown jewels: he even carried an ostentatious quantity of campaign plate with him, as in the fourth year of his reign. There is an instrument in Rymer, the title of which is, "Super jocalibus ad bellum de Agincourt deperditis." Rymer, vol. iv. part ii. p. 163. Among these are saltfellers of gold. The consequence of this profusion was, that his army was most miserably paid; the carrier of his banner, therefore, at the battle of Agincourt, sets forth, in a petition to his successor in the second year of his reign, that though he had incurred great expences in attending Henry the Fifth to France, yet he had never received any reward or salary whatsoever. See Rymer, vol. iv. part iv. p. 106.

[*f*] See a story, in Dr. Harris's History of Kent, in which it is mentioned, that this king set out with a considerable body of troops from Eltham at midnight, and fell upon 70 or 80 poor harmless Lollards, who were assembled at St. Giles's for their devotions merely, and for no treasonable purpose. Book i. p. 80. From the number of these hereticks, who were confined and prosecuted, one of the S. W. corners of old Paul's was called the Lollard's tower, being their usual prison. There is also a Lollard's tower in the palace at Lambeth, and the rings are said to remain still to which the sufferers were chained. The tower at St. Paul's was probably the prison of the bishop of London for these hereticks.

Titus thought very differently, with regard to these kinds of prosecutions, τὰς τε δικὰς τῆς ἀσεβείας ἅτ' αὐτῷ ὥστε εἰδέσθαι, ἅτ' ἄλλοις ἐπιτρέψεν. Dio Cassius, l. xvi.

STATUTES MADE AT WESTMINSTER,

1 Hen. VI. A. D. 1422.

THE first chapter of the first statute of this minor king empowers his council to appoint in what places money shall be coined; which I should not have observed upon, did it not afford an argument, that, though a minor king is said to be invested with the complete regal authority, yet the interposition of the privy council is hereby immediately made necessary to the carrying into execution what is on all hands confessed to be, perhaps, the most undoubted of royal prerogatives.

The 3d chapter directs, that, on account of the murders, rapes, robberies, and other felonies, committed in different counties of England by Irishmen, resorting to the university of Oxford, all natives of that country shall be obliged to leave England within a month, under pain of forfeitures and imprisonment, except graduates in the university [g], beneficed clergymen, and lawyers; and that even these graduates (though permitted to continue) should not be capable of being chosen principal or head of any house or hall. The severity of this law is not, indeed, equal to the rigour of those against the Welsh in the preceding reign; but the Irish had not, as far as I can find by their historians [b], been guilty of any rebellion or insurrection in their own country, and surely some riots in the neighbourhood of Oxford might

[g] "En les escoles," in the original.

[b] They do not even take notice of this statute, or the first of Henry the Fifth, against the Irish. It is stated, however, in the Rolls of Parliament of this year, that the Irish, Welsh, and Scotch, scholars, in the University of Cambridge, had burnt and rifled several houses in that county, as they had nothing to support them. Vol. iv. p. 358. See also the preamble, in Rastell.

have been punished in the common course of proceeding against malefactors, without banishing a whole nation, which was now incorporated with England [i]. The statute of the first of Henry the Fifth, which likewise directs the Irish to repair to their homes, gives a more humane reason for the injunctions, viz. "*That their own country was depopulated by the great resort of the Irish to England.*"

The 5th chapter enacts, that a third share of the booty taken during the wars shall be allowed at the Exchequer to the late king's officers; one part of which is recited to be the ransom of prisoners; the remaining two-thirds are to be paid to the crown. War is now carried on upon a so much more liberal footing, that such a distribution of the booty, and arising from such articles, may rather surprize a reader of these times. I remember, however, to have seen, in *Leland's Itinerary*, two or three different accounts of great houses and castles being built out of the price of a prisoner's ransom; particularly *Sudely-castle* [k] in Gloucestershire.

Sir — Latimer, who was impeached by the parliament, in the fiftieth year of Edward the Third, alleged in his defence, that he had never received above 10,000*l.*; and states, that the chief article from which this sum arose was the ransom of pri-

[i] There is a dispensation (in the eighth year of Hen. VI.) with this statute to an Irishman, provided he will pay ten marks into the king's hanaper. Petyt, Mss. vol. xxxiv. p. 224. These *Non Obstantes*, on such conditions, have given rise anciently to many an oppressive and absurd law, but which hath answered the purpose of filling the king's coffers.

In the same year we find letters of denization, on condition of paying the same sum. Ibid. p. 247. See also Rymer, vol. iv. part iv. p. 163. 6 Hen. VI. where there is another instance of such a fine to the king.

[k] The windows of this castle are said, by Leland, to have been glazed with beryl; I should suppose with glass coloured like beryl. Harrison, in his description of Britayne, mentions, that some of them continued in his time, p. 85.

soners

soners at the battle of *Orroye*. In the forty-fifth year of Edward the Third, the commons petition the king for a law which was to explain upon what footing the French garçons and valets, who had been taken prisoners, and had remained many years in England, should be considered, whether as prisoners or *villeyns* [1]. There is likewise an instrument in Rymer, by which it appears, that Henry the Fourth paid ten thousand marks to Owen Glendower, for the ransom of Lord Grey of Ruthin [m]. Mr. Petyt, also, in his *Mss. Collectanea*, gives us the articles of war which were established by Henry the Fifth for his first campaign in France; one of these is entituled "*For taking of*

[1] Pet. in Parl. vol. ii. p. 308.

[m] See vol. iv. part i. p. 36. De Financiâ solvendâ Owino de Glendor. Owen Glendower married the daughter of this Lord Grey of Ruthin for his first wife, and obliged the father to give his consent whilst he was his prisoner. St-Palaye, in his *Dissertations on the ancient chivalry*, gives an account of a French knight (whose name was Du Guesclin *) being taken prisoner at the battle of Poitiers, who fixed his own ransom at a very high price. Upon the prince of Wales's expressing doubts, whether he would be able to raise such a sum, Du Guesclin answered, that he first depended upon the kings of France and Castile, and, if they would not pay the ransom, he had at least an hundred friends who would sell their estates, and that every woman in France would spin for his deliverance: this prisoner, notwithstanding, is said to have been more than commonly deformed. Montluc (in his *Commentaries*) speaks thus likewise of the ransom, which he expected from Marco Antonio, a Roman knight: "*Il me va en l'entendement, que facilement je prendrois prisonnier ce seigneur, et que si je le pouvois attraper, j'étois riche a jamais. Car pour le moins, j'en aurois quatre vingt mille ecus de rançon, qui estoit son revenue d'un an, et n'estoit pas trop.*" From this it should seem, that there were settled terms, upon which the captor and prisoner treated, and that they generally agreed, at the rate of a year's income, *qui n'estoit pas trop*.

* Bertrand du Guesclin, afterwards constable of France. Montf. Antiq. de la Mon. Fr. c. iii. p. 9, et p. 30.

"Prisoners,"

“*Prisoners*,” and is thus worded; “alsoe be it at the battle, or
 “other deedes of arms, where prisoners be taken; who that
 “first may have his *faye*,” (which I understand to mean, he, to
 whom the prisoner shall first furrender himself, and pledge his
faye, or faith not to make his escape) “shall have him for his
 “prisoner, and shall not neede to abide by him [*n*].” An old
 French chronicle, printed at Paris in 1508, speaks thus of the
 great pressing of the English to make king John of France their
 prisoner at the battle of *Poiitiers*, who was considered as the
 20,000 *l.* prize in the lottery: “*Car chacun disoit, je l’ay prins;*
 “*et certes il y avoit grand presse, et a grant peine pouvoit aller* [*o*].”

Hollinshed therefore, in the reign of Richard the Second,
 hath the following passage, which shews that a war with France
 was esteemed as almost the only method by which an English
 gentleman could become rich: “For where in times past, the
 “Englishmenne had greatly gained by the warres of France,

[*n*] Vol. i. p. 510. They were also regularly transferred according to
 convenience, and sometimes the king brought a prisoner from his cap-
 tor, as appears by an instrument in Rymer, entituled, “*Super emptione*
 “*prisonarii in bello capti.*” Vol. iii. part iii. p. 2. A. D. 1375 and 49
 Edw. III. They were sometimes, on the other hand, purchased from
 the king. See *ibid.* part. iii. p. 49. A. D. 1376. There are instances,
 likewise, of the king’s forbidding the sale of prisoners by the captors for
 a *certain time*. See Rymer, vol. iv. part i. p. 36. 2 Hen. IV. The
 proclamation, however, acknowledges their right. It is remarkable, that
 one of the Saxon words for booty, acquired in war, is a *theft*—[*þa*
þe þar ƿærl-ƿyrðe ƿapon, binnan Lunden býrig ƿebrohton. Saxon
 Chronicle, p. 97. which is applied to one army acting against another.

[*o*] The ransom of a king was therefore the greatest sum of money,
 which they could form an idea of; and hence these ancient lines, with
 regard to *Hinkston Hill* in Cornwall, which was supposed to be full of
 very valuable mines:

“*Hinkston Hill, well wrought,*

“*Is worth a king’s ransom, dearly bought.*”

“who

“ who had by the same maynteyned their estate, they could not
 “ give their willing consents to have any peace at all with the
 “ Frenchmenne, in hope by reason of the wars to profit them-
 “ selves as in times past they had done [p].” This so very gene-
 ral a method of becoming rich anciently, could not escape our
 historical and antiquarian poet Drayton :

“ Some that themselves by ransoms would enrich,
 “ To make their prey of peasants did despise,
 “ Felt as they thought their bloody palms to itch,
 “ To be in action for their wealthy prize.”

And again :

“ Except some few in some great captain’s hands,
 “ Whose ransoms might his empty coffers fill [q].”

As we find by this statute, that the crown reserved two-thirds
 of the booty, and even of the ransom of the prisoners, it may
 be supposed, that so great a share would hardly have been given
 to the commanding officers [r], as in more modern expedi-
 tions.

[p] Vol. ii. p. 1083. By the ancient laws of Norway, the prisoner,
 and every thing which he wore or had about him, belonged to the captor,
 except the gold in his purse, which was reserved for the king, it being
 considered as a royal mine with us. See Speculum Regale, p. 258.

[q] Drayton’s Battle of Agincourt. It is stated in the Rolls of Parlia-
 ment, 8 Hen. VII. that the ransom of the Lord Talbot, prisoner to the
 French, was *unreasonable and importable*. Vol. iv. p. 338.

[r] Οἱ μοι καθ’ Ἑλλάδ’ ὡς κακῶς νομιζέσθαι,
 Ὅταν τροπαία πολεμίων σῆσθι στρατῷ,
 Οὐ τῶν πονεόντων τ’ ἔργον ἡγνύται τοδε,
 Ἀλλ’ ὁ στρατηγὸς τὴν δοκῆσιν ἀρνύται,
 Ὅς εἰς μετ’ ἀλλῶν μυρίων πᾶλλον δορυ,

Οὐδὲν πλεῖον ὄρων ἐν στήθεσσι, εἷς πλεῖον λόγον. Eurip. Androm. ver. 695.
 which the poets put into the mouth of Peleus, himself a king, and con-
 sequently a general. When Lucullus, therefore, who had enriched him-
 self by booty, wanted to animate his soldiers; he was answered, *μονον*
μαχεσθαι τοῖς πολεμίοις, ἀφ’ ὧν μόνον ἡπιστάτο πλεῖον. Plutarch, in vitâ Luculli.

It

It appears, by Joinville's Life of St. Lewis, that the king of France was entitled to a third of the plunder from the Saracens, whilst the pilgrims and army divided the remaining part of the booty.

Pasquier informs us, it was an ancient custom in France, that the king might claim any prisoner from the captor, provided he paid him 10,000 livres*. This is something like the provision, with respect to royal mines, by the statute of William the Third.

* P. 378.

STATUTES MADE AT WESTMINSTER,

3 Hen. VI. A. D. 1424.

THE second chapter of these statutes hath a very extraordinary preamble, viz. that great numbers of sheep, ready for shearing, were exported into Flanders, to the great decrease of the customs, and the impoverishment of the country. Notwithstanding this recital, I can scarcely suppose that it would answer, to carry sheep out of the kingdom when part of the intention is said to have been the shearing them, and the felling their wool. I should therefore conceive, that this was a practice, which only existed in the imagination of the person who drew the act, and that no such allegation could possibly have been proved before a committee of parliament. It is frequently said, indeed, that the preamble to a statute is the best key to its construction; it often, however, dwells upon a pretence, which was not the real occasion of the law [s], when, perhaps, the proposer had very different views in contemplation. The most common recital for the introduction of any new regulation is to set forth, *that doubts have arisen at common law*, which frequently never existed; and such preambles have, therefore, much weakened the force of the common law, in several instances.

The 12th chapter, of the 18th of this king, furnishes us with a proof of this, as well as many other statutes. By the ninth of Henry the Fifth, it hath been enacted, that malicious indictments, supposing crimes to have been committed in places not

[s] There is a statute of Edward the Fourth, the preamble of which recites, that bad feathers in beds had been the occasion of a plague: feathers are never imported from the infected countries.

to

to be found in any part of the country, should be utterly void. This statute, by exprefs words, was only to continue till *the next parliament after the return of that king from France*; and yet, in the 18th year of his fucceffor, it is recited to be a doubt whether the statute was then in force; “par opinion de afcuns *eft expiré*, “par opinion des afcuns *nient expiré* [t].” I would not from this compare the preamble of a statute to that of a patent of nobility, but only infinuate, that they fhould not be implicitly believed; nor are they always the true occafion or foundation of the law to which they are prefixed. It muft be admitted, however, that the civilians hold “*ceffante legis proæmio, ceffat et lex.*”

Not only the preamble, but the enaëting part of this statute, feems not to prove any great wifdom or knowledge in the legiflature of the times; it is *comparatively*, however, a better law than a statute of Queen Elizabeth [u] to the fame purport, which makes it even felony to carry fheep out of the kingdom; whereas the penalty, by this law, is only forfeiture of the animal. Moft regulations of this fort will always be found ineffectual; and it is providential, that one country fhould want the products of another,

— γαρ ἄλλῃ

Ἄλλον ἐθήκε Θεὸς τ' ἐπιτηδεᾶ φῶτα; . . . Callim.

as thus the union between nation and nation is preferved, by the neceffity of mutual commerce.

The 5th chapter of this law directs, that commiffions may be awarded under the great feal, to promote the navigation of

[t] Since the former editions, it hath occurred to me, that poffibly this doubt might have arifen from Henry the Fifth's dying in France, who therefore could not be faid to return to England, though his corpfè was interred at Weftminfter Abbey. I mention this merely as a conjecture, to account for this extraordinary doubt of the legiflature, as it is not even alluded to in the law itfelf.

[u] 8 Eliz. ch. iii.

the river *Lee* from Ware in Hertfordshire, till it is lost in the Thames; and is the first instance of a parliamentary provision for the navigation of an inland river. I should imagine, that there had been very great losses by floods, at this time, on the estates in the fen countries; as, in the 6th year of this king's reign, provision is made for general commissions of sewers [w], which perhaps was the first instance of their having ever issued. One of these is directed to the commissioners for *Lyndsey hundred* in Lincolnshire, and, amongst some other curious particulars, empowers them to press as many labourers into their service as they should think necessary [x].

We find, in Riley's *Placita Parliamentaria* [y], a law which was proposed this year, and which hath expired together with

[w] This word is not a corruption of *shoars*, as some have supposed, but means a sea-wear or mound to keep off the sea; Rastal, therefore, in his edition of the statutes, generally spells the word *sewars*. See the title of 6 Hen. VIII. ch. x. as also other instances.

Harrison (in his *Description of Britayne*) mentions a most extraordinary method, which prevailed formerly in the fen countries, of punishing those who should neglect the repair of a sea-mound: "Finally, those who have
" walles and sea banks near the sea, and doe suffer them to decay, whereby
" the water entereth and drowneth the country, they are by a certaine
" custome apprehended, condemned, and staked in the breache, where
" they remayne for ever, as a parcel of the foundation of the new walle
" that is to be made upon them, as I have heard reported." Ch. vi. p. 128. A.

[x] It is said by Sir Edward Coke *, that the king hath a power, by the common law, to issue a commission for this purpose, as the judges held that he was obliged to defend his realm against the attacks of the sea, as much as against those of an enemy. There is, also, in the *Petyt Manuscripts*, an order of Edward the First (in the fifth year of his reign) to the sherives of Gloucestershire and Worcestershire, to widen the Severn in a particular part, and to send all those *in vinculis* to the king and parliament who should obstruct so necessary a work †.

[y] P. 672.

* 10 Rep. 141.

† Vol. xiv. p. 38.

the occasion of making it, unless it should be construed to be a general provision against the marriage of a queen dowager, without the king's consent.

Petitiones Parliamenti de anno vi regni regis Hen. sexti.

As toward a bille conceived and ministred unto the lordes spirituel and temporel in this parlement to be made for a statut, of the whiche the tenuer here followeth.

Item ordene, soit stablye per auctorite de cest present parliament pur la salvacion de lonur des tresnoble Estats des roynes. *Dengleterre* pur le temps estants, qe nulle homme de queconque degree, ou condition quil soit, ne face contract des espousailles ou matrimoigne, ne soy marié a quelque Roynie *Dengleterre sanz especial licence* et assent du roy mesmes, luy esteant des ans de discrecion; et celuy qui ferra le contraire, et ent soit duement convict, forface pur terme de sa vie au roy toutz ses terres et tenements, sibien ceulx qui sont ou ferront en ses mayns propres, come ceulx que sont ou ferront es mayns daultres a son oeps, et aussi tous ses biens et chateaux en quelconques mains quilz soient; considerez qu par la desparagement du royne lestat et lonur du roy ferroient tresgrandement emblemez, et dorra le greindre confort et example as autres dames destat, queux sont del sang roial pur le plus legierment desparager. We Herry Archbishop of Canterbury, John Archb. of York, William Bishop of London, the Bishop of Ely, John Bishop of Rouchester, John Bishop of Bath, Will. Bishop of Norwiche, Richard Abbot of Westmynstre, Nicol Abbot of Glastinbury, William Abbot of Seynt Maries of York, and Nicol Abbot of Hyde, gife oure assent thus and never otherwise, that is to say, as far forthe as the said bille is not ageins the law of God and of his chirche, but standeth therewith, and emporteth no dedly synne. Requiring this to be enacted in the parliament rolle."

Dorsos.

Dorso.

“ Soit enacte en maner come tielx protestacions et condicions
“ ont este enactez devant ces heures.”

It is a very extraordinary declaration, that the queen-mother shall not marry without the consent of the infant king, who was now but four years of age; and if it is contended, that the “ *du* “ *consent du roy (luy estant des ans de discretion)*” means, that his consent was not necessary till he was of such age, the answer is, that this construction would have made the act entirely nugatory, as it could not take effect till twelve years afterwards, when queen Katharine must probably have dropt all thoughts of marriage. It is also remarkable that *Owen Tudor*, after the queen’s death, was committed to the Tower upon this statute, from which he twice made his escape [z].

[z] Grafton’s Chronicle, p. 134. Jenkins, in his Centuries, likewise takes notice of this law.

STATUTES

STATUTES MADE AT WESTMINSTER.

8 Hen. VI. A. D. 1429.

IN the introduction to the statutes of this year, which consist of no less than nine-and-twenty chapters, Henry the Sixth is for the first time styled *Christianissimus Dominus Noster*; which title he had possibly assumed as king of France.

The 2d chapter is of a very singular nature, as it is made to promote the trade of another country. *Christiern* king of Denmark, who was uncle to Henry the Sixth, had issued a proclamation, that no foreigner should carry merchandise to any of his ports on the coast of Norway, except that of *Northbarn* [a]; and this statute directs all Englishmen to observe this regulation under penalty of forfeiting their goods. The trade between England and Denmark, at this time, consisted chiefly in the exchange of wool for fish, or rather, indeed, in our fishing on their coasts [b]; for we find, by a statute made two years after this, that, the *Danes* having seized the cargoes of some ships belonging to merchants of Hull, it is complained, that no *Danes* or *Norwegians* ever come into this island upon whom

[a] I suppose *Northbarn* is the same with *Bergen*: there is a town called *Bergen* on the island of *Rugen*, off the coast of *Pomerania*, and therefore *Bergen* in Norway seems to be properly called *North Bergen*, to distinguish it from *Bergen* in the Baltick. It appears, by Anderson's History of Commerce, that there was anciently a considerable herring fishery in the Baltick, and particularly near *Rugen*. See a dispensation with regard to this statute in favour *Episcopi Olenfis in Islandiâ*. Rymer, vol. v. part i. p. 31. A. D. 1436, 14 Hen. VI. It appears by this licence that this bishop was born in England, and that his Christian name was John.

[b] By an Irish statute of the seventh of Edward the Fourth, foreigners are not permitted to fish off the coast of Ireland.

they

they can make reprisals [c]. The remedy given by the legislature is, that the complainants shall be entitled to letters of privy seal, and, if satisfaction is not made, that the king will then provide one.

There is a proclamation in Rymer's *Fœdera*, which issued in the third year of Henry the Fifth, relative to this fishery on the coast of Norway and Iceland: "Rex vicecomitibus Londoniæ salutem—Proclamari faciatis, quod nullus ligeus noster, usque ad finem unius anni proxime jam venturi, ad partes insulares regnorum Daniæ & Norwegiæ, præsertim ad insulam de *Iceland*, piscandi causâ, seu aliis de causis, in præjudicium regis regnorum istorum, accedere præsumat aliter quam fieri antiquitus solebat." It may be difficult, at this distance of time, to know what kind of fishery, or trade [d], was carried on by the English on these coasts; as neither the method of harpooning whales, or extracting their oil from the blubber, was probably known at this time, unless it is inferred

[c] This shews, that by the *Law of Nations* (as then understood) there was a very summary method of receiving justice. There is, in Mr. Petyt's *Collectanea*, a head thus intituled, "*Repairing of Wrongs*," under which he hath collected several instances, from records, of the kings of England doing this summary justice to their subjects, who had been injured by foreigners. Vol. i. p. 479, et seq.

[d] Stone for buildings was imported anciently from Iceland: "So the Hull-men ballast their vessels with Iceland stones." Harris's *Description of Britayne*, p. 114. R. He before mentions its being esteemed for this purpose. Leland indeed informs us, that it was supposed Wresl castle, belonging to the earls of Northumberland, which is not far from Hull, was built by stone from the coast of France. *Itin.* vol. i. p. 45. In the same part he takes notice, that this town had much increased from the time of Richard the Second, by having the entire trade of stock fish from Iceland. *Ibid.* p. 41. It should seem, therefore, that there was a great cod-fishery thus far to the northward, three or four centuries ago. The Danes insisted upon this exclusive right of fishery in their seas during the reign of Queen Elizabeth, which she appears to have much resented. See Rymer, vol. vii. part ii. A. D. 1600, and 42d of Elizabeth.

from the direction of this proclamation not to fish on the coast of Iceland. I should rather suppose, indeed, that whales, so far back as the beginning of the fifteenth century, were not to be found in the high northern latitudes, in which they are fished for at present [e]. We hear eternally, in the old law-books, of the king's prerogative in royal fish; which, therefore, must have made a considerable branch of the revenue [f]; and *Juvenal* speaks of the *balæna Britannica* as we would at present of a *Greenland* whale. It is well known, that such fish are scarcely ever seen at present on our coasts; which, therefore, seem to have left our seas, as being too warm, for those more to the Northward, where they find a climate more suited to their wants and feelings. The cultivation of North America having on the other hand rendered the seasons in those latitudes more mild than they were; late accounts inform us, that within these few years great numbers of the spermaceti whales have been caught in the Gulph of St. Lawrence, which before was probably *too cold* for them.

[e] It is not whales only which change their haunts; herrings and other fish appear for a number of years in particular places, and then totally desert them. There was, in the time of Queen Elizabeth, a very considerable herring-fishery off Aberystwith, and about fifty years afterwards near Aberdovey; which are now removed further to the northward on the Welsh coast. Such a number of a large fish of the shark kind appeared likewise on the Carnarvonshire coast (during the years 1759 and 1760), that the oil extracted from them amounted to a considerable value. Such fish were never heard of, or seen, by the oldest fishermen, before that time; and they have now again entirely disappeared.

[f] I apprehend, that the custom of sending a *present* (*as it is styled*) to the king, of the sturgeon taken in the *Thames*, arises from this ancient prerogative of the crown, as it is one of the *Royal Fish*. I find, however, by a case stated with regard to a right of fishery in the *Thames*, that the *taker* of the sturgeon is entitled to a *marc*, though the fish belongs to the king, paying that satisfaction. In Denmark, the whale and sturgeon are considered as the king's property, wherever caught. *Stiernhook, De Jure Sueonum vetusto*, l. ii. c. 8.

STATUTES MADE AT WESTMINSTER,

15 Hen. VI. A. D. 1436.

THE first chapter of these laws recites, that the court of the steward and marshal, now commonly called the *Marshalsey Court*, had, by a fiction in the pleadings, supposed the plaintiff or defendant to belong to the king's household, who in reality had no such office, and had thus improperly increased the jurisdiction of the court. The statute, therefore, directs, that proof may be admitted against this allegation, intending to confine the suits to those parties only who are the proper objects of the *Marshalsey* jurisdiction. This seems to be a very wise provision of the legislature, as all such fictions derogate from the proper weight and dignity in the proceedings of a court of justice. Use may, in some measure, have taken away from the ridicule of the fiction of a *quo minus* in the Exchequer, or *latitat* in the King's Bench, as well as other such suggestions; but the nature of them cannot be thoroughly altered, so as to make that proper which, in its commencement, was a ridiculous and false surmise.

The 2d chapter deserves only to be taken notice of, as it seems to be the first permission to export corn to be found in the statute-book [g]. Agriculture must now have been greatly improved,

[g] The words of this statute are, "Item pur ceo que par la leie ordenee, nul homme poet carier blees hors du royaume sans licence del roy, per cause de quel, fermours ne poent vendre leurs blees finon a baes prise, a *grand damage* de tout le royaume."

Much hath been said of late with regard to the king's prerogative of laying an embargo on corn intended to be exported. I do not mean to enter into the question, whether modern acts of parliament have not taken away

improved, as appears by Fortescue's description of England [b], which he says is a well-peopled (I had almost said paradise of a) country, whilst he represents France to be almost an uncultivated desert. He might have, indeed, some national prejudices; but he had certainly great opportunities of comparing the two kingdoms, as he was so long abroad with the son of Henry the Sixth.

The 4th chapter directs, that no one shall sue a subpoena out of the Court of Chancery, without finding proper security, as this practice is recited to be "en subversion et impediment del common ley." The civil wars, during the reign of Henry the Fourth, must have greatly increased feoffments to secret uses and trusts [i], which the courts of common law either could away this prerogative; but it should seem that the king was invested with such a power by the common law.

I find accordingly, in Mr. Petyt's Collection of Manuscripts, an express prohibition of the exportation of corn by Henry the Third, in the forty-fourth year of his reign:

"Rex ballivis et probis hominibus suis de Gippewic, Oreford, Dunwich, et Yernemuth. Sciatis quod assignavimus dilectum et fidelem nostrum Rogerum Bygod, Comitem Norfolciæ, ad providendum, ordinandum, necnon *ad prohibendum* ex parte nostrâ, ne aliquod *bladum*, vel aliud genus victualium per mare, extra partes vestras deferatur." Petyt, Mss. vol. vi. p. 152. An order follows afterwards to seize the boat, or vessel, which shall attempt to export such grain. There are likewise many proclamations to prevent the exportation of corn during the reign of Henry the Eighth, as also during that of Edward the Sixth, all of which issued in time of peace.

I must admit, however, that there is a passage in Fox's Martyrology, vol. ii. p. 2. which shews that there were doubts in the privy council, even in the reign of Henry the Eighth, with regard to this power in the crown.

[b] In his treatise De Laudibus Legum Angliæ.

[i] There is an Irish statute against these secret feoffments so early as the third of Edward the Second, commonly styled *The Statutes of Kilkenny*.

not reach, or were unwilling to comprehend within their jurisdiction : this must have considerably augmented the business of the court of equity [k], whose wings it was therefore necessary to clip. The inconvenience to the subject arose not only from the proceedings being more expensive and dilatory than by the common law, but likewise from the inexperience as well as ignorance of the judge, whose office was rather that of a secretary of state [l], than the president of a court of justice. The first person invested with this high station, who was properly qualified by being educated professionally, was Sir Thomas Moore [m].

Not-

[k] Williams (in his *Jus appellandi*) asserts, that the court of Equity in the Chancery began in this reign under the chancellorship of *Henry Beaufort*; and in the time of Philip and Mary the entry was, "it is decreed by the Lord Chancellor and the whole court," p. 39 and 42. The rapid progress and increase of business in this court is amazing, as Sir *Edward Coke*, in the debates of the House of Commons during the session of 1621, asserts, that, in the time of Henry the Sixth, no more than 400 subpoenas issued one year with another out of the Chancery; whereas, in the reign of James the First, the number was not less than 35,000, vol. i. p. 226.

[l] "Apud Anglo-Saxones, qui Cancellarii postea dicti erant apud Anglo-Normannos, *Boceras* appellati sunt, i. e. scribæ, notarii, qui regibus duntaxat ab epistolis et chartis fuerunt, in quibus scribendis, et forsitan dictandis, operam navârunt." *Hickes's Thes.* vol. ii. p. 46.

"Instituit item rex Gulielmus scribarum collegium, qui diplomata scriberent, et ejus collegii magistrum vocant Cancellarium." *Pol. Virgil*, lib. ix.

"Deux autres pieces souscrites de la main du *Mesme Chancelier*, ou *Notaire*." *Nouv. Tr. de Dipl.* vol. vi. p. 239.

Fitz Stephens also gives a very particular account of the office and duty of an English Chancellor, no part of which relates to his judicial authority.

[m] Roper, in his *Life of Sir Thomas*, informs us, that he read every bill preferred to him, and often stopped any farther proceedings. From the dispatch which he gave as Chancellor, the following lines were written in his commendation by some poet in the time of Henry the Eighth :

Notwithstanding this precedent, we find that Queen Elizabeth gave the great seal to her vice-chamberlain, Sir Christopher Hatton, without any notice being taken, by the historians of the time, of the impropriety of this appointment [n]. In the reign of James the First, Archbishop Williams was appointed lord keeper; and Hacket, who wrote his life, says, that he dispatched many more causes than his predecessors [o] had done in the same time. That the court had really a great deal of

“ When *More* some years had Chancellor been,

“ No more suits did remain :

“ The same shall never more be seen,

“ Till *More* be there again.”

Fuller's Worthies, p. 209.

[n] Mr. *Ravenscroft* asserts, that there never was any reference to a Master in Chancery till Sir *Christopher Hatton* was appointed to that office, which he likewise mentions to have arisen from this Chancellor's ignorance. [Deb. H. Comm. 1620, lately published in 2 vols. 12mo.] There was also, in the year 1620, a bill proposed, that there should be two judges of the *coif*, *assessors* to the Lord Chancellor. Ibid. p. 352.

It must be admitted, however, that the Journals of the House of Lords furnish a very eloquent speech by Sir Christopher Hatton immediately after the destruction of the Spanish armada. See Journals, Feb. 4, 1588. There is also a short treatise on the construction of Statutes, which was printed in 1677, after his death; if this was really written by him, it must be allowed not to be entirely destitute of merit. Spencer the poet addresses a sonnet to this chancellor, in which he commends him greatly as a statesman, but seems to have entirely forgot that he presided in a court of justice. Camden indeed says, that his appointment was not approved of by the lawyers, but that, “splendidissime omnium tamen quos vidimus se gessit, et quod ex juris scientiâ defuit, ex æquitate supplere studuit.” Camden, Eliz. A. D. 1587. There are frequent references in Wanley's Catalogue of Anglo-Saxon Mss. to the Hatton Library, which I conclude was collected by this Chancellor.

[o] Sir Nicholas Bacon and Lord Ellesmere. Archbishop Williams had been chaplain to the last of these Chancellors. Fuller's Worthies, p. 177.

business

business whilst he presided, appears by this most irrefragable proof; fifteen serjeants, or barristers of great eminence, attended the Chancery, whilst he was invested with this high office [p]. Notwithstanding this increase of suits in the court of Equity, there is not a report of a single decision by Lord Bacon [q]; we have some few indeed (and those important ones) by lord Nottingham, but scarcely a determination of consequence by lord Somers. Though this last very consummate politician was succeeded by lawyers of eminence, yet it may be said, that we owe the present beneficial system of equity to the peculiar national felicity of the greatest lawyer and statesman of this, or perhaps any other country, having presided in this court, near twenty years, without a single decree having been reversed, in any part of it; an infallibility, which in no other instance was ever the lot of humanity.

[p] Hacket's Life of Archbishop Williams. It should seem from the proceedings against *Wraynham*, for libelling Lord Bacon with regard to one of his decrees, that the Chancellors sometimes decided causes rather in a more summary manner than is usual at present. Amongst other curious particulars to be inferred from that trial, it is very clear, that the Master of the Rolls was then considered only as the first Master in Chancery, as *his reports* are frequently alluded to. State Trials, vol. vii. p. 102 & seq. It likewise appears that Q. Elizabeth, on complaint of one of Sir Nicholas Bacon's decrees, ordered two judges to attend him at his own house, and that the chancellor reversed it. Ibid. p. 109.

[q] In a letter to the House of Lords, however, he states, that he usually made two thousand decrees and orders in a year. See the Journal of that House, on the 19th of May, 1621.

STATUTES MADE AT WESTMINSTER,

20 Hen. VI. A. D. 1442.

THE 9th chapter of these laws is the only instance of an explanation of any part of Magna Charta, though it hath been so often confirmed [r]. It recites a doubt, whether a peeress was

[r] This statute was occasioned by the dutchess of Gloucester's being first charged with treason, and afterwards necromancy; prosecutions for this last offence were now very common, as appears by the many writs in Rymer, *De sortilegis capiendis*. The Rev. Mr. Harte (in his Life of Gustavus Adolphus) mentions, that he saw three witches hanging on the banks of the Sanna (a river in Austria), who had been convicted of blasting their neighbours corn. It is greatly to the honour of this country, to have repealed all the statutes against this supposed crime so long ago as the year 1736, when laws of the same sort continue in full force against these miserable and aged objects of compassion, rather than persecution, in every other part of Europe.

One cannot but be sorry to find so great and liberal a man as Selden, attempting to justify the punishing witchcraft capitally: "The law against witches does not prove that there be any, but it punishes the malice of those who use such means to take away mens lives. If one should profess, that by turning his hat thrice, and crying *Buz*, he could take away a man's life (though in truth he could do no such thing), yet this were a just law made by the state, that whosoever should turn his hat thrice, and cry *Buz*, with an intention to take away a man's life, shall be put to death." Selden's Works, vol. iii. p. 2077. Notwithstanding this great authority, I think such a law may be declared to be not only ridiculous and futile, but highly unjust. Lord Bacon rather supposes, that there may be charms to occasion impotence, and adds, it is a thing of no light regard, because the civil law takes notice of it. Cent. ix. Exp. 888. Dr. Grey, in his Notes on Hudibras, mentions, that Hopkins, the noted witchfinder, hanged 60 suspected

was to be considered as within the words of the known 29th chapter, "Nullus liber homo capiatur, &c. nisi per legale iudicium parium suorum, aut per legem terræ." There had now elapsed two hundred and seven years since Magna Charta was first enacted; and it seems at first rather extraordinary that no peers had been tried for a capital offence, which must have before settled this doubt. The first reason for this seems to be, that the peers did not amount to a fourth of the number which they consist of at present; and the second is, that though perhaps peeresses might have joined with their husbands in treasonable plots, yet, to the honour of these more early ages, it was thought inhuman to prosecute a woman, as she was supposed to act under the coercion of her husband, nor could she, from the imbecillity of her sex, contribute much to carrying the treason into execution, except by her good wishes for every enterprize in which her lord was embarked. It was reserved for the reign of James the Second to prosecute lady *Lisle* for the harbouring a traitor [s].

It

suspected witches in one year. He also cites Hutchinson on witchcraft, for 30,000 having been burnt within 150 years.

Etoile, in his Memoirs, informs us, necromancy was so much encouraged by Catharine of Medici, mother of Henry the third of France, that in the year 1572 there were supposed to be 30,000 in that kingdom addicted to this study. Tom. i. p. 219. There is an able pamphlet of Sir Robert Filmer's, against the proofs generally relied upon in the conviction of witches, which is entitled, "An advertisement to the jurymen of England touching witches."

[s] Henry the Fourth, indeed, issued a warrant for the apprehending Hotspur's wife. See Rymer, vol. iv. part i. p. 57. It appears from the title of this warrant, which is "De arrestando *Elizabetham Percy*" (who is described afterwards to be the wife of Henry Percy), that Shakespeare, who is generally very accurate in his historical plays, hath been guilty of a trifling mistake in making Hotspur call this wife of his, *Kate*.

It

It should seem indeed, from a passage in Monstrelet's Chronicle, that it was not customary, in his time, to execute women in France for any crime whatsoever, as he describes a vast concourse of people, who assembled from all parts of the kingdom, upon such an occasion, "pour la grande nouvelleté que c'estoit a veoir
"pendre une femme, car onques plus ne fut veu au royaume de
"France [t]."

It is rather extraordinary that the peerage, who, like other bodies of men, are generally very tenacious of their privileges, should not have at this time insisted upon being tried for a misdemeanor by their peers, as the prejudices of a common jury are more likely to operate in a misdemeanor than in a capital offence. Surely the words "Nullus liber homo capiatur, aut
"imprisonetur, aut *aliquo alio modo* destruatur, nisi per legale
"judicium parium suorum," seem to have been anxiously inserted to include every kind of criminal prosecution. It is indeed not only a provision in favour of the subject, by one of the chapters of *Magna Charta*, but seems to have been likewise the law of every part of *Europe*, where the feudal policy had been introduced. Thus *Thaumafieres*, in his Commentary on *Les assises de Jerusalem*, says, "Les nobles estoient jugés par leur Paires, et les
"Bourgeois par autres Bourgeois et prudhommes." He likewise cites *Beaumanoir* for this, "Se li jugemens fut fait par bourgeois,
"je ne tins pas che pour jugemens, car il est fait par chaux qui
"ne puent, ni ne doivent juger."

By the enumeration of the ranks of peerage in this statute, viz. *Duchesses, Countesses, et Baroneses*, we may correct a mistake of the heralds, who inform us, that John lord Beaumont was

It should seem however, from this warrant, that Henry's design was rather to examine her, in order to detect the conspiracies against him, than to bring her to the scaffold as a traitress. The order also is only directed, "dilecto armigero suo Roberto Waterton."

[t] P. 8. t. iii.

created the first English viscount in the eighteenth year of this king; but it is impossible that the legislature, two years after this introduction of a new order of nobility, should have omitted to enumerate it in the present statute, between the rank of countess, and baroness. This new rank was, however, instituted before the thirtieth year of this king, as the 31st Hen. VI. ch. ii. makes mention of it amongst the other degrees of nobility.

I must admit, however, that I have lately found, in Madox's Baronage, the word Vice-comitissa is used in a record so early as the time of Henry the Second [u]. This viscountess is styled, de Bello-Monte, and she was therefore probably a foreigner, who had obtained this rank in France.

[u] P. 144. Marchionesses, indeed, are also omitted in this statute; and there was a Marquis of Suffolk, in the twenty-third year of Henry the Sixth. See Rot. Parl. vol. v. p. 73.

STATUTES MADE AT WESTMINSTER,

33 Hen. VI. A. D. 1455.

I HAVE before had occasion to observe, that some statutes have been attended with very prejudicial consequences, when they have declared that to be an offence, which was already criminal by the common law, when properly understood. The 1st chapter of the present statute furnishes an instance of this, by providing a remedy against the servants of a deceased person, who, upon the death of their master, have riotously taken possession of his goods, and made distribution of them amongst themselves: there can be no doubt but that this was punishable by the common law, either as a tort, riot, or larceny, according to the circumstances attending the case.

By the 9th chapter of the statutes of the preceding parliament it is also declared, "that a bond, extorted from a woman whilst "under confinement, shall be void;" and there can be as little doubt, but that any deed so obtained was clearly void by the common law. In like manner, the 4th chapter of the 28th of this king makes it felony for any Welsh or Lancashire man to take the goods of another *under a pretence of distress*, which, being *in fraudem legis*, was most undoubtedly a felony by the common law. These three instances occurring within two or three years seem to make it probable, that the drawing of acts of parliament was now in the hands of those who probably had not studied the law professionally; and this observation receives a confirmation from the figurative stile, and number of epithets, which are used in the 31st of this king, with relation to Cade, the Kentish rebel; "Le plus *abominable, tyranne, horrible, odious, et erraunt faulx* traitour John Cade," which by no

G g g 2

means

means agree with the simplicity of the common law. The attorney-general, in opening the circumstances of guilt, which are to be proved against a traitor, may use oratory if he pleases, though perhaps better omitted; but the common law in indictments speaks but one and the same language, notwithstanding the crime may be attended with the most aggravating circumstances; and though many may think, that some parts of an old form might be dropt, yet it is much more prudent to adhere to it. This must strike any one, who reads an indictment, or charge, either in the French or Scotch law, which are drawn out to a preposterous length, and in which the advocate attempts to prejudice the court by rhetorical and figurative descriptions.

Mr. Locke, in his Essay on the Human Understanding, seems therefore to disapprove of a professorship of rhetoric in our universities, as it is calculated to instruct pupils in the arts of deceit. He concludes however the chapter by saying, "that it will be thought great boldness, if not brutality, in him, to have said thus much against it. Eloquence, like the fair sex, hath too prevailing beauties in it, to suffer itself ever to be spoken against; and it is in vain to find fault with those arts of deceiving, wherein men find pleasure to be deceived [*w*]." Tully exclaims still more strongly against the orator's imposing upon the judge. "Cumque nihil tam in- corruptum esse debeat in republicâ quam suffragium, quam sententia; non intelligo cur qui eâ pecuniâ corruperit poenâ dignus sit: qui eloquentiâ, laudem etiam ferat. Mihi quidem hoc plus mali facere videtur, qui oratione, quam qui pretio judicem corrumpit: quod pecuniâ corrumpere prudentem nemo potest; dicendo potest."

I cite this noble passage from Ammianus Marcellinus [*x*], because possibly it may not be found in the works of this great

[*w*] Works, vol. i. p. 237. ed. 1759.

[*x*] L. xxx. c. iv.

writer and orator which are now extant. Petrarch had a Ms. treatise of Tully *de Gloria*, which is now intirely lost [y].

The 4th chapter of these statutes directs, that no person, in the county of Kent, shall make above one hundred quarters of malt into beer or ale, for his own use, which is a very singular regulation. The occasion of it I cannot even form a guess about, if perhaps it had not been found in *Cade's* late rebellion, which arose in Kent, that it had been much fomented and increased by the help of great quantities of this animating liquor to an Englishman in the cellars of the gentry of this county, which the rioters, probably, made a very free use of [z].

The 5th chapter relates to the mystery of *filk-women*, which therefore should rather have been in *French* [a], than in Latin. "Per gravem querimoniam sericatricum et filatricum (mysteria
"et occupatione operis serici infra civitatem London) ostensum
"fuit, qualiter diversi *Lumbardi* et alii alienigenæ dictam my-
"steriam et omnes alias *virtuosas* occupationes mulierum præ-
"dictarum destruere, seipfos ditare, &c." The law then directs, that any such *Lombard*, or alien, shall forfeit twenty pounds, half to the informer, and the other half to be applied

[y] See Mem. de Petrarche, and Menagiana, p. 90. Tully's famous work de Republicâ also was once in this kingdom, and was lost at Canterbury. Biograph. Dict. in the Life of John Dee.

[z] In the time of Henry the Second, the Kentish ale was supposed to be superior to that of any county in England, "cerevisia, qualis in Angliâ fieri solet optima, et præcipuè in Cantiâ." Gir. Cambrensis, de rebus à se gestis, c. v. The Roll of Parliament, of the second of Richard the Second, recites, that in the County of Kent . . . "y fourdont sovent plus
"qu'en autres pays." There is a chasm, indeed, before these words, but there can be little doubt from the context, that what preceded must have related to the mobs and riots in that county. See the lately printed Rolls of Parliament, vol. iii. p. 46.

[a] I find accordingly, that this is afterwards printed as a statute of 3 Edw. IV. ch. iii. in French,

in defraying the expences of the king's household; which clause may not, therefore, improperly be styled the first *Appropriation* act.

There are two or three things in this last statute, which, perhaps, deserve notice; the first is, that the cry, at this time, was against Italians, and Italian manufactures, and not against the French; the next is, that silk began to be used in dress, and that a great number of hands were employed, either in the manufacture, or in making habits from it. The last more minute particular is, that it should seem this clause was drawn by some Lombard, who had quarrelled with his countrymen established in England from the expression of *virtuosas occupationes mulierum* [b], which seems to be a translation of the Italian word *virtuoso* in the sense it is commonly used: and regulations of this kind are seldom made without the assistance of such false brethren.

The 7th chapter reduces the number of attornies, who are allowed to practice in the counties of Norfolk and Suffolk, to six, on account of their being the occasion of unnecessary law-suits, which, and from their *ignorance likewise*, they were not able to manage, for the true interests of their clients. It may, however, be said, that the ignorance of this parliament far exceeded that of the attornies complained against [c]. If there was not a proper

[b] Agreeable to this expression, used by the legislature, of *virtuosas occupationes mulierum*, a lady's needle-work is still in Scotland called *her virtue*..

[c] By 4 Hen. ch. xviii. it is directed, that the judges shall examine the attorney before he is admitted. Archbishop Cranmer, in the reign of Henry the Eighth, restrained the number of Proctors to eight, who might act in the Court of Arches. Stowe, vol. i. p. 155. Ed. 1720. This was, however, soon afterwards altered (as it should seem) on the complaint of the profession.

number of persons educated to the profession of the law, the subject in this country would be under the same dependence that the Romans were to those who undertook their causes, indeed, without fee [d], but thereby kept up an improper vassalage, between citizen and citizen, in a free country.

This

[d] The Roman advocates, in the time of Trajan, were permitted to receive a fee to the amount of 10,000 sesterces (or about 80*l.* of our money) *after the cause was over*: “Suberat edicto SC. hoc. OMNES
“QUICQUID NEGOTII HABERENT, JURARE PRIUS QUAM AGERENT JUBEBANTUR, NIHIL SE OB ADVOCATIONEM CUIQUAM DEDISSE, PROMISSISSE, CAVISSE. His enim verbis (et mille præterea), et venire advocaciones, et emi vetabantur. *Peraclis tamen negotiis mittebantur pecuniam dumtaxat decem millium dare.*” Pliny, l. v. ep. 21.

Before this permission, during the reign of Trajan, every kind of gratification had been forbidden by the *Lex Cincia**, to which an epigram alludes under the portrait of Pasquier the French advocate and antiquary, prefixed to his works, ed. 1633.

“Nulla hic Paschasio manus est, Lex Cincia quippe

“Causidicos nullas sanxit habere manus.”

It is necessary to mention, in order to explain these lines, that the engraving is only what the limners call *a three-quarters length*.

“Vereor ne arrogantius a me dictum videatur, dicam tamen: a nemine unquam honorarium accepi; ut si non magnâ cum eloquentiæ laude, certè maximâ dignitate causas me egisse etiam illi ipsi mei obtrectatores agnoscere necesse habeant. Quod non dico, quia turpe putem honorarium accipere, quis enim etiam procerum suis stipendiis militat?”
Menage, in his *Dedication of the Amoenitates Juris Civilis*.

Des Barreaux went still farther, as having been long plagued with a very troublesome cause; he sent for the parties, and paid the sum in litigation. *Patiniana*, p. 50.

Fabricius ab Aquapendente refused fees to good purpose, because he received presents to a greater value. The plate, thus thrown at his feet, was ostentatiously ranged in his study with this inscription over it,

“LVCRİ NEGLECTI LVCRVM.”

Ibid.

* *M. Cincius* proposed this law against an advocate's taking a fee, A. Urb. Con. 549; This is sometimes cited under the title of *Lex Muneralis*.

This is the last statute of this reign which I shall have occasion to observe upon, and I shall not attempt to consider Henry the Sixth as a legislator. His long minority, and weakness of understanding [*e*] when he arrived at more mature years, make him incapable of any character whatsoever, in any relation of life; such a king could, possibly, be of no other use than that of the Roman consuls, in the fall of the empire, *to mark the year* [*f*]. The want of spirit, or capacity, was so notorious in him, as to have prolonged his life even after his being deposed; and by this he furnishes an instance in history, which contradicts the common observation, that the day of the confinement of a king and his death are seldom far distant.

A lawyer's fee, in the *Βασιλικων*, is termed *εργολαβος*, which seems to be an extraordinary translation of the term *honorarium*. In the year 1571, a bill was proposed in the House of Commons to regulate the fees of counsellors. Journals, vol. i. p. 93.

[*e*] It appears, by records in Rymer, that he studied Alchemy. If any person was supposed to be possessed of this invaluable secret, he was immediately considered as treasure-trove, or a royal mine, and the king detained him together with his apparatus. See Rymer, vol. ii. part iii. p. 24. The Alchemists sometimes likewise had writs of protection, instances of both which may be seen in Rymer. Henry the Sixth was not the only king of England who wished to become an adept in this now most ridiculed branch of science: some chroniclers have supposed the same with regard to Edward the Third. See also Sir John Davis on Tonnage, who says it was conceived that this king had purchased the secret from the famous Raymond Lully.

[*f*] Miracles, however, were performed at his tomb after his death. See Harleian Mss. vol. i. N. 423.7. though Widmore (in his antiquities of Westminster-Abbey) says, that the court of Rome asked too much for Henry's canonization, so that he never became a complete saint. P. 121. Widmore also mentions, that his body was removed to Westminster Abbey, at the expence of 500l.; but that no one knows where it was deposited. Ibid.

STATUTES MADE AT WESTMINSTER.

3 Edw. IV. A. D 1463.

IT does great honour to Edward the Fourth, now only in the third year of his reign, when his title to the throne was by no means a clear one, and the real king was alive, that out of five chapters, which compose the only statutes of this session, three should have been expressly made to promote the trade and manufactures of this kingdom. Instances are not very common of such an attention in kings, whilst in such a situation; especially in these more early times, when the benefits of commerce had been so little experienced; and that this king had these regulations much at heart, will appear by the observations on a statute in the twenty-second year of his reign.

The first chapter relates to our staple commodity of wool, speaks of the honour of it, as well as profit, and of the crimes which are the result of idleness. That this valuable manufacture may continue to maintain its credit, and just value in the foreign market, provisions are made against most extraordinary frauds, which are recited to have been made in the packing of wool, by putting into it earth, stones, sand, ordure, or *pele* [b], with intention to increase its weight. We often hear of cheats and abuses in manufactures at present; but I do not recollect any instance equal to what is recited by this statute: the modern world is certainly more knowing; but, notwithstanding the general cry against the wickedness of the

[b] I find since the last edition, that Rastal hath translated the word *pele* by *dirt*, which seems to be a corruption of *paille*, or straw; I am informed, however, by great authority, that *pele* in some counties signifies skin with the wool on.

H h h

times,

times, I doubt much whether the ancient saying is true, that *crescit, in orbe, dolus*. These frauds amongst traders, however, are by no means confined to Europe, as Tavernier, who had been six different times in the East Indies, hath several chapters, by which he cautions the European merchants against the deceptions of the Asiatic in almost every article of commerce.

The 4th chapter is thus entitled, *Certain merchandizes not lawful to be brought ready wrought [i] into the kingdom*. It enumerates almost every kind of goods which can be imported; and may be now looked upon as a fundamental law of the customs, founded upon the best principles of commerce, which does not seem to have been so well understood in some of the following reigns, and particularly that of Henry the Eighth.

[i] As there are frequent prosecutions upon this statute, it is to be wished, that some of the enumerated articles were more accurately translated. By the law of Saxony, he who buys, or uses a smuggled commodity is in all instances liable to penalties, as well as the smuggler. Fynes Morrison, part iii. p. 208. Which seems to be a regulation to be adopted in other countries, and which would greatly contribute to the increase of the revenue, as well as the support of the fair trader.

STATUTES MADE AT WESTMINSTER.

17 Edw. IV. Stat. A. D. 1477.

THE monk who writes the history of *Crowland* abbey [k] informs us, that there were so many disorders and riots this year committed by the soldiers, on their return from the expedition to France, that Edward went in person, together with the judges, to try the criminals in different parts of England, “Nemini etiam si domestico suo parcens, quo minus laqueo perderet, si in furto vel latrocinio *deprehensus* fuerit [l].”

It

[k] Gale, vol. i. p. 559.

[l] Modern writers and statutes always speak of the criminals suffering upon *conviction*; but ancient laws and chronicles generally dwell upon the *apprehension*, by which is meant detection in what is called the *mainer*, or *furtum manifestum*. The old French word for *apprehended* is commonly spelt *prist* or *prit*, and not *pris*; hence an etymology, with regard to the word *culprit**, offers itself, which has occasioned many far-fetched conjectures. The common question asked the criminal is, *Culprit*, how wilt thou be tried? which is, in other words, *apprehended criminal*, how wilt thou be tried? I have been informed (since the first edition), that this etymology is considered as far-fetched. I do not mean to pretend to infallibility in this, or in other matters of more importance than etymology, in which there is generally a great deal of whim. I admit, that it is liable to objection; but I would only beg those who adhere to the old etymology (than which nothing can be more forced), to weigh critically the more common accounts of the derivation of this word†, and whether they are not still more refined, and unnatural. They will also consider, that this is a most ancient form used in the trial of criminals, and that *Culprit* is *necessarily the vocative case*. This word is likewise

* I should suppose this term is derived from *coulpe*, an old French word, signifying crime, or blame; and *prit*, used according to the import it bears at present.

† Which makes *culprit* a contraction of no fewer words than “*culpabilis, es, et hoc paratus sum verificare.*”

It is not extraordinary, that soldiers returned from a campaign should be inclined to continue the maroding and pilfering to which they had been too much addicted in the enemy's country [m]. We apprehend such consequences from the breaking a few regiments when peace is concluded; but, as there was now no regular pay or establishment for the army, except during the short time which the campaign lasted, every one at the close of it was immediately dismissed, without any

used by some of our old writers as a substantive, and synonymous with *wretch*, or person in a calamitous situation, which agrees with the sense I have contended for, viz. that of an *apprehended criminal*, or *prisoner*.

“Quod si omnium vocum, quarum origines in hoc capite investigavimus, origines assequuti non sumus, et id veniâ dignum esse, qui etymologices paulo peritus fuerit, nemo quoque, ni fallor, inficiabitur. Non omnium quæ a majoribus constituta sunt, ratio reddi potest.” Menagii Amœn. Jur. Civ. p. 431. “Labeo Antistius in grammaticam sese atque dialecticam, literasque antiquiores penetraverat. Latinarumque vocum rationes originesque percalluerat, eaque præcipuè scientiâ ad enodandos juris laqueos utebatur.” Aul. Gell. l. xiii. So that this kind of learning has been found necessary in the explanation of all laws.

[m] Mr. Petyt has inserted, in his *Collectanea*, the articles of war which Henry the Fifth established, the very titles of some of which are curious: as, “*The Robbinge of Merchauntes*, which is punished with death—*For Barretors*—*For Debate*—*For them that crye Havocke*—*For them that destroy vines, or other trees bearing fruit*—*For them which use bordel, the whiche lodge in the hoste*.” The punishment of the strumpet is, that she is to have all the money she hath in her pockets taken from her; she is likewise to have her arm broken, and to be driven with a staff out of the army. Petyt, Coll. vol. i. p. 509, et seq. Philippe de Comines, who lived at this time, accuses the English soldiers of having been always much addicted to drunkenness: it is very remarkable, however, that Petrarch attributes the defeats of the French armies by Edward the Third to that vice having prevailed universally amongst their soldiery. See Mem. de Petrarche, vol. iii. p. 533. Petrarche had been an eye-witness of this.

kind

kind of precautions being taken [n] to prevent the disorders which were naturally to be expected.

The discharged soldiers were not only guilty of pilfering on their return; they had likewise introduced the camp vice of gaming. The 3d chapter, therefore, forbids playing at *Cloissh*, *ragle*, *halfbowle*, *quekeborde*, *bandyn* and *bandoute*; and if any person permits even others to use these pastimes in his house or yard, he is to be imprisoned for three years. Those also who play at any such game are to forfeit ten pounds, and continue in gaol for two years.

This is, perhaps, the most severe law which was ever made in any country against gaming; and some of these forbidden sports seem to have been manly exercises [o], particularly the *bandyn* and *bandoute*, which I should suppose to be a kind of cricket, as the term of *bands* is still retained in that game. There is a very remarkable preamble to a law of *Provence* in Du Moulin, which prohibits the playing at cards or dice.

‘Item car jugadouars als das, ou a las cartas, commeton de

[n] The manner of raising and paying the armies appears by the 18th and 19th chapters of the twentieth of Henry the Sixth. The captains agreed by indenture with the king, to procure such a number of men for a time specified. The kings of England used likewise, when they wanted soldiers for an expedition against France, to pardon criminals whilst they served abroad, provided they found security to answer any prosecution on their return, “*si quis adversus eos loqui velit.*” See Hal. Pl. Cr. vol. ii. p. 145. and Bacon on Government, part ii. p. 11. The occasion of which conditional pardon probably arose from appeals for robbery and other offences being then very frequent, as the prosecutor, by indictment, was not entitled to restitution, till the statute of Henry the Eighth.

[o] In the eighteenth year of Henry the Eighth a proclamation issued against playing at cards or bowls; but Baker takes notice, that it was productive of greater misdemeanors; the same observation is made in the Roman-catholic countries during Lent, when public amusements are forbidden.

“grans

“ grans mals et destruction des beins, et aussi que commune-
 “ ment en tout jeu, si dan de grans renegaments, et blasphem-
 “ ments [*p*], de Dieu, et de la vierge Marie, et dels fains, et
 “ fantas de paradis, per las cals causas Dieu aucunement est
 “ ci corroufé, et nous punit par mortalitas, ou autras af-
 “ flictions [*q*].”

There is a still more extraordinary law of the state of Lucca, which does not forbid this vice in general, but only in company with women. The games mentioned are, *Farlandus*, *brincholandus*, *albus et giallus*, and the *rigbinetta*; for an explanation of which terms, I must refer to Duchat's notes on the chapter in Rabelais, wherein Pantagruel is said to have amused himself at every pastime which was then known.

[*p*] “ St. Louis ordanna qu'on perçat la langue, ou qu'on coupat la
 “ levre superieure à quiconque aurait prononcé ces termes indécents, viz.
 “ *Tete-bleu—ventre-bleu*. Il en couta la langue à un gros bourgeois de
 “ Paris, qui s'en plaignit au Pape Innocent IV. Ce Pontife remontra
 “ fortement au Roi, que la peine étoit trop forte pour le délit : le Roi
 “ s'abstint désormais de cette sévérité. Il eut été heureux pour la société
 “ humaine, que les Papes n'eussent jamais affecté d'autre superiorité sur
 “ les Rois.” Commentaire sur le livre des Délits et des Peines, p. 25.
 Paris, 1766, and ascribed to Voltaire.

[*q*] Du Moulin, vol. ii. p. 1244. The vice of gaming had been introduced into England before the time of Edward the Fourth, as Chaucer speaks thus of it :

“ As *basard*, riot, stewes, and tavernes,
 “ Whereat with lutes, harps, and geternes,
 “ Thei dauncen, and plaien at *dice*, night and day.”

And again :

“ For in the cite n'as there no prentise,
 “ That fairer couth castin a pair of dice.

Chaucer, in the Cook's Tale.

In the following reign of Henry the Seventh, Caxton, in one of his prefaces, addresses his readers :

“ What do ye now but playe at dyse ?

The second chapter of this law is calculated to prevent the encroachments of the courts of Pipowder, which, like most others, wanted to extend its jurisdiction, or, in other terms, the profits arising from it. The judge therefore, supposed by an absurd fiction that parties, who never had any transactions at the fair, had made the bargain in dispute within the limits, and by this means claimed consuance of the suit. The statute therefore directs, that the plaintiff, in the Pipowder court, shall swear, his cause of action actually arose within the precinct of the fair; and the law seems to have been effectually carried into execution [r], as we hear little of these courts at present. I cannot but here take notice that the etymology of the word *Pipowder* seems to be mistaken by most of the writers upon the law, who derive it from *pes pulverisatus*, or dusty foot; now *pied puldereaux*, in old French, signifies a *Pedlar*, who gets his livelihood by vending his goods where he can, without any certain or fixed residence. In the *burrow laws* of Scotland [s], an alien merchant is called *pied puldreaux*, and likewise *ane far-and man*, or a man who frequents fairs; the court of Pipowder is, therefore, to determine disputes between those who resort to fairs, and these kinds of pedlars, who generally attend them.

[r] The law, perhaps, which hath been most completely executed of any in the statute-book, is the statute of Charles the Second, which directs the sheriff and others to root up all the tobacco growing in the county. Before this, it was much planted in different parts of England, particularly Gloucestershire*, as appears by many proclamations in the time of James, and Charles the First, and also some of Charles the Second, previous to that statute. In the year 1580, a bill was proposed in the House of Commons, to prevent the sowing of hemp or flax in Hertfordshire, which probably arose from the stench occasioned by its putrefying when steeped in ditches. See Journals, vol. i.

[s] Ch. cxxxiv.

* See Fuller's Worthies, p. 334.

STATUTES MADE AT WESTMINSTER,

22 Edw. IV. A. D. 1482.

THE first chapter of this statute is entitled *An Act of apparel* (κατ' ἐξοχην), as it repeals all former laws of the same kind; it not only directs of what materials the dress of each class shall consist, but likewise settles the length; and that no one, under the degree of lord, shall wear a cloak or gown which is not long enough to cover his hips. What is, perhaps, more singular than this part of the regulation, eleven persons [i] particularly named, are excepted out of this statute, and indulged to dress according to their own fancy.

Phillips, in his treatise of *Purveyance*, informs us that Q. Elizabeth took a most extraordinary method of enforcing a law of a similar tendency, by obliging the tailors to enter into a recognisance, that they should not make cloaths above such a value [u].

The 4th chapter regulates the price of yew bows [w], which is not to exceed three shillings and four pence; the words of the

[i] Most of them are knights, and I should conceive were always candidates for ribbands upon every vacancy; one of them is *Master John Gunthorp*, dean of the king's chapel. This statute is repealed by 1 Hen. VIII. c. xiv. and 1 Jam. I. c. xxv.

[u]. P. 393.

[w] I should imagine, that the planting yews in church-yards, being places fenced from cattle, arose, at least in many instances, from an attention to the material from which the best bows are made; nor do we hear of such trees being planted in the church-yards of other parts of Europe. It appears by 4 Henry V. chap. iii. that the wood of which the best arrows were made was the asp. As the botanical distinctions between this tree and the *Black Poplar* are attended with some nicety, it must have been

the preamble reciting the great benefits to this country arising from archery are remarkable: "Item que come en le temps
 "dels nobles progenitours del roy, et auffi en le temps del
 "victorieux seigneur le roy qu'ore est, ses subgetz deins chescun
 "part cestuy royaume ount occupez et usez sagitture ove leurs
 "arkes." This king not only endeavoured to promote archery [*x*]
 in

been very difficult to convict on this statute. If this remark is considered as too minute, it must be recollected, that the *Elders* (according to the account in the Apocrypha) were convicted merely on the circumstance of their differing with regard to the kind of tree, under which *Susanna* was supposed to have committed adultery.

It seems very singular, that all the laws, for the encouragement of archery, should be after the invention of gun-powder and fire-arms. Henry the Fifth, in the fourth year of his reign, issued an order to the sheriff of Kent, "in singulis villis et locis comitatus de quacunque aucâ (præter aucas Brodoges* vulgariter nuncupatas) sex pennas alarum suarum pro sagittis ad opus nostrum de novo faciendis, magis congruas, et competentes, &c. Rymer, vol. iv. part ii. p. 193. The same orders are likewise sent to many of the midland counties. There is a statute so late as the eighth year of Queen Elizabeth, which relates to *bowyers*; and one of the regulations is, that every such tradesman shall always have in his house fifty bows made of elm, witch, hasel, or ash. Ch. x. § 7. Archery was also encouraged by proclamations, both of James and Charles the First, whose successor attended the company of this name, when they were shooting in the artillery-ground, in the year 1682. [The Bowman's Glory, by William Wood, printed in 1691.]

The French, having experienced the great superiority of the English archers, in the reign of Charles the Seventh began likewise to encourage this exercise. See Pasquier's *Recherches de la France*, p. 133. There is also a Scotch statute of the year 1457, which directs butts and bowmarks to be erected in every parish. Maitland, vol. ii. p. 647.

[*x*] That most military man, and knight errant, Lord Herbert of Cherbury, who wrote so late as the reign of James the First, asserts, that *good* archers would do more execution, even at that time, than infantry

* This is the term in Rymer, but I do not understand the meaning of it, perhaps it may be geese that are breeding, and have eggs.

in England, but likewise made laws of the same tendency in Ireland; for by 5 Edw. IV. ch. iv. [y] every Englishman is obliged to have a bow in his house of *his own length*, either of yew, wych, hasel, ash, or awburn (alder probably); and by another statute it is directed, that butts shall be raised in every parish for this exercise, which regulation was not introduced into England till the time of Henry the Eighth, and may have been the occasion of some of those round hills of earth near towns, which have often amused and puzzled the antiquaries [z]. The present statutes, which are the last of Edward the Fourth, are likewise the last in the French language. It continued, however, to be used much about the court, even so late as the reign of Henry the Eighth [a], as most of his love-letters to

Anne

armed with musquets. The same poet (who is so accurate with regard to British antiquities) informs us, that the best bows were made of Spanish yew:

“All made of Spanish yew, their bows were wondrous strong.”

Drayton's Polyolbion, Song 26.

[y] Irish Statutes.

[z] They are in Wales called *Tommen*, which signifies a *dunghill*; these mounds of earth somewhat resembling such a heap. See Davis's Dictionary. Maitland however says, that *Tommoide* in Erse imports a mound of green earth, on which the Highlanders frequently made their more solemn contracts. Cæsar also makes mention of them in Gaul: “Planities erat magna, et in eâ tumulus terreus satis grandis.” De Bello Gallico, l. i. c. 43.

[a] We find, notwithstanding, by *Leland's Collectanea*, that it was then part of the duty of the English clergy, who had benefices in the neighbourhood of Calais, to teach the English language, vol. i. p. xlv. Leland himself had one of these livings.

Edward the Sixth generally corresponded with his sisters in French. I shall transcribe a letter of his, thus directed:

“A ma treschere, et bien aymee sœur Elyzabeth.

“Puis quil vous a pleu me rescrire (treschere et bien aymee sœur)
 “je vous remercie de bien bon cœur, et non seulement de votre lettre,
 “mais aussy de votre bonne exhortation et exemple, laquelle ainſy que
 “j'espere

Anne Boleyn, published by Hearne at the end of Avesbury's Chronicle, are in French. Anne Boleyn left England early, indeed, for an education in the court of France (some writers say at nine, and others at the age of fifteen); but, as she not long after this returned to England, it cannot be supposed that she had entirely forgot her mother-tongue. We find, likewise, by an epigram of Sir Thomas More's, that the speaking French was much affected in the reign of Henry the Eighth[b]; it had not, however, the convenience, which attends it at present, of being the general language of Europe.

This king reigned twenty-two years, and summoned nine parliaments, in some of which we find most wise regulations with regard to commerce and the promotion of industry. If the monk, who writes the history of *Croyland* abbey, is to be credited, Edward not only understood trade[c], but actually carried it

“j'espere me servira desperon pour vous suivre en apprenant, priant Dieu
 “pour vous avoir en sa garde. De Titanhanger, 18 jour de Decembre,
 “et l'an de nostre Seigneur 1546. Votre frere,

“EDOUARD Prince.”

Petyt, Mss. vol. xlvi. p. 10.

Though the observation may perhaps appear minute, I cannot help taking notice, that the paper, on which this original letter is written, would now be esteemed good; and that the mark upon it, seen through the light, is a hand and star. This paper possibly was imported; but, if English, it does honour to the manufacture at that time established in this country. As for the mark, this circumstance may detect ancient forgeries, as well as more modern ones, if properly attended to.

[b] “Crescit tamen, sibi que nimirum placet,
 “Verbis tribus si quid loquatur Gallicè;
 “Aut Gallicis si quid nequit vocabulis,
 “Conatur id, licet verbis non Gallicis,
 “Canore saltem personare Gallico.”

[c] Gale, vol. i. p. 559. Edward also is said to have imported 3000 sheep from Spain. Busching's Geography, Art. ENGLAND, in Not.

on after his accession to the throne, to his own private and very great emolument. "Edwardus, comparatis navibus onerariis, et subtilissimis pannis, lanisque conquistis, quasi unus hominum viventium per mercaturam, merces pro mercibus tam apud Italos, quam apud Græcos, commutavit." The profits which he made by this commerce to the Mediterranean and Levant are afterwards stated by the same author. One of the Byzantine historians mentions a saying of the Emperor Leo, which shews that he had a very different notion with regard to a king's becoming a merchant. This emperor was amusing himself in his garden at Constantinople, when a ship sailed by him, which he described to have been so large, that the shade projected to the spot where he was sitting. Upon his inquiring to whom it might belong, he was told, that his empress had freighted it with merchandise; on this, he ordered the ship with its cargo to be burnt, asking whether an emperor or his *Augusta* had ever before so debased themselves [d].

Edward began his reign by a most politic statute, the tendency of which was, to abolish the fatal disputes between the houses of York and Lancaster. He likewise confirmed all acts of his predecessors, though he mentions them as kings *en fait, et nient en droit*, which is the first instance of this known distinction being introduced in the statute-book. His reign may be said to have been a popular one, for which Sir Thomas More assigns the following reason, "He had left off gathering money, which is the only thing that draweth the hearts of Englishmen from their kings and princes."

[d] Constantini Porphyrogeneti Continuator, l. iii. p. 41. ed. Venet. 1729. Henry the Seventh, when he sent Cabot on his discoveries, reserved to himself, "quintam partem totius capitalis lucri sui facti, five in mercibus, five in pecuniis, solvendam." Rymer, vol. v. part iv. p. 89. 11 Hen. 7.

The same historian mentions indeed another cause, in the following words, "he sent plenty of venisone to the citizens wives, "so that no one thinge gat him more hartes [*e*]."

Edward hath perhaps a better title to be considered as a legislator than any other king of England, as he actually presided in the courts of justice, if we may believe Daniel. "Edward the Fourth, in the second year of his reign, sat three "days together, during Michaelmas term, in the court of King's "Bench, in order to understand the law [*f*];" and I have, on the

[*e*] In the Life of Edward the Fifth, p. 4.

[*f*] Truffel's continuation of Daniel's history, p. 184. The present king of Denmark (though then of so tender years) presided in the supreme court of justice, and decided a cause on the 6th of March, 1766: it therefore seems to have been an ancient and generally-established usage in the north of Europe: and hence it may possibly arise, that some of the oldest writers dwell much upon the necessity of a king's being learned:

"Car comme un asne couronnez,

"Est un Rois terrien sans lettre.

"Roy sans lettres, comme une asne feroit,

"S'il ne sçavoit l'écriture, ou les leys,

"Chacun de ly par tout se moqueroit."

And again:

"Roy qui ne scet, est comme oisel en caige,

"Mais quant il est clerc, ou bon* Arciens,

"Ainsi sur tous puet avoir avantaige."

Fortunatus of Poitiers thus celebrates King Charibert for his satisfactory decision of causes.

"Si veniant aliquæ variato murmure causæ,

"Nodosæ litis solvere fila potes."

Lord Ch. J. Hobart (in Wraynham's trial) asserts, that the power of judging in the king, as a *dernier resort*, is an inherent quality to his crown; "*si cessat judicare, cessat regnare*." State Trials, vol. vii. p. 110.

Joseph Scaliger declares himself very explicitly, notwithstanding this, against a king's doing any thing, but through the medium of his council:

* A Master of Arts.

"Hispaniæ

the seventeenth of Edward the Fourth, already had occasion to observe, that he presided at the trials of many criminals. I do not mean by this to insinuate, that justice may not be more properly administered by the king's judges; but only that the same curiosity which carried him into the courts of Westminster-hall, must have likewise given him a desire still more minutely to inspect and attend to all parliamentary proceedings.

"Hispaniæ rex nihil curat; habet consilium quod omnia curat: Galliæ rex omnia curat, *ideo malè habent.*" Scaligerana, p. 75. This scourge of crowned heads, and his contemporary writers, seems to have been particularly displeased with the kings of France; for, in another place, he says, "de soixante trois roys en France, nous n'avons pas dix qui ayent valu quelque chose." Ibid. p. 221.

STATUTES

STATUTES MADE AT WESTMINSTER,

1 Rich. III. A. D. 1483.

THE reign of Richard the Third is a remarkable epocha in the legislative annals of this country; not only from the statutes having continued from this time to be in the English language[g], but likewise from their having been the first which

[g] In the first year of Richard the Second, the archbishop opens the parliament by a sort of sermon, on the text, *Ecce venit rex tuus*, "Seigneurs et fires, ces paroles que j'ay dist, sont tant a dire *en Franceys*, vostre Roy vient a toy," lately-printed Rolls of Parliament, vol. iii. p. 3. All the letters from Scotland, during the reign of Q. Elizabeth, are written in French; and a translation was made into English at the different offices, where they were received. The letters from Burleigh and other ministers likewise, to the English ambassadors at foreign courts, are in French. Many instruments also relating to the English business continue in that language, during that and the following reign. Rymer.

Chief Justice Thirning, however, makes an English speech, whilst he pronounces judgement in parliament upon Edward duke of Aumarle, Thomas duke of Surrey, &c. in the first year of Henry the fourth. See the lately printed Rolls.

Edward the Fourth, in the 16th year of his reign, appointed Oliver King to be his secretary for the French language. Rymer, vol. iii. part iii. p. 69. The great reproach to this country, for having so long neglected their vernacular tongue, may appear by the following unprejudiced testimony of a learned foreigner, "In his jure numeraveris linguam Anglicam, quæ five nativam vim exprimendi quoscunque sensus animi, five copiam verborum quibus undique augetur et exornatur, five numerum ac concinnitatem cogitaveris, nemini, verè dixerim, ne veteri quidem Græcæ cedit." Benzeliuss's Preface prefixed to Serenius's Swedish Dict. Hamburgi, 1734, Quarto.

were ever printed [*b*]. We accordingly find, by the 12th section of the 9th chapter of these laws, exceptions in favour of *scriveners* [*i*], *alluminors* [*k*], printers, and *readers* [*l*] of books.

[*b*] *Ames* (in his History of Printing) informs us, that they are to be found in the Inner Temple library, as likewise in that of John Browning, Esq. The printer's name is *Machlynia*, or *Machlyn* who was partner to John Lettou: what are called private acts likewise begin with this reign.

[*i*] Scriveners at this time seem to have been chiefly employed in copying books: thus Chaucer concludes his works by an address to his scrivener, whose name was Adam;

“ Adam Scrivener, yf ever it the befalle,
 “ Boice or Troiles for to write newe,
 “ Under thy long lockes thou mayst have the scalle,
 “ But after my making thou write more true;
 “ So ofte a day I mote thy werke renewe,
 “ It to correcte, and eke to rubbe, and scrape,
 “ And al is thorow thy negligence, and rape.”

[*k*] Illuminators, i. e. decorators of books; hence our word *limner*.

The king hath to this day an illuminator of letters to the eastern princes: *Dante* speaks of this art,

“ e l'honor di quell' arte,
 “ Ch' *alluminare* è chiamata in Parigi.”

There is a church, under Mount Ararat, dedicated to St. George (probably of Cappadocia) the *Illuminator*. Tournef. vol. ii. p. 332.

[*l*] Books (though printed) were now excessively dear, which makes me conjecture that the *readers*, mentioned by the statute, were booksellers, who received money from an audience, who were either incapable themselves of reading, or otherwise could not afford to purchase the books. Fitzherbert's Abridgement, in the reign of Henry the Eighth, sold for forty shillings; and the number of readers in the same reign was so small, that Grafton, in 1540, printed but 1500 copies of the Bible. The same reason of the scarcity of books seems to have been the occasion of establishing such professorships, as those of history, divinity, and indeed all sciences which do not require to be explained by experiments, which institutions seem now to be totally useless.

The

The 1st chapter, with regard to secret feoffments and trusts, is only abridged in most editions of the statutes, but deserves the attention of lawyers, as lord chancellor Nottingham, in a manuscript treatise upon *trusts and uses*, is said to have excused the evasion of the twenty-seventh of Henry the Eighth in the courts of equity, by the statute of Henry the Eighth not being inteneded to extend to *all trusts and uses, but only to be co-extensive with* this law of Richard the Third.

The 2d chapter enacts, that the subjects of this realm shall not be charged with *Benevolences*; and the preamble recites, that many families had been absolutely ruined under these pretended presents to the king, but which were in reality extorted taxes. The duke of Buckingham therefore, who was so instrumental in procuring the crown for Richard the Third, said, "That the name of *benevolence* (as it was understood in the reign of Edward the Fourth) signified, that every man should pay, not *what he of his own good will list*, but what the king *of his good will list to take* [m]."

Henry the Seventh, who succeeded, is known to have been so avaricious, that he soon broke through this most constitutional statute [n]; and, in the year 1526, Henry the Eighth having demanded a benevolence from the city of London, one of the common-council objected to the paying it, citing this act of Richard the Third. He moreover added, in the presence of Cardinal Wolsey, that some persons coming before his grace might, through fear, grant so much as not to be able to pay

[m] Sir Thomas More's Life of Richard the Third; or rather, according to Buck, Dr. Morton's, though published by Sir Thomas.

[n] See 11 Hen. VII. ch. x. which is entituled, *A Remedy, or means to levy a Benevolence before granted to the King*. The first mention of a *benevolence* in Rymer is in the 11th year of Edward the Third. The order is thus entituled, "*De pecuniâ Regi benevolis concedendâ*." See vol. ii. part iii. p. 191.

their own debts, and by these means ruin their families. To this the cardinal did not answer; but, with regard to the statute of Richard the Third, he said, "*He was an usurper, and a murderer of his nephews; and that the laws of so wicked a man should not be enforced.*" The common-council then replied, that "*though he did evil, yet were many good statutes made, not by him only, but by the consent of the whole realm in parliament [o].*" Notwithstanding this most excellent law continued in full force, yet we find, in Pynson's edition of the statutes, that in the nineteenth year of Henry the Seventh the two houses of parliament passed a second bill, "For levyenge the arrerages of the *benevolence* last granted."

The 3d chapter enacts, that every justice of peace may let a prisoner to mainprise, and that his goods shall not be seized till he is attainted. This is a most humane law, which became necessary from the justices of the peace beginning now to execute their very useful office [p]; and though they had a power to commit, yet it should seem, that they had not that of bailing, which must have frequently been the occasion of unnecessary delays to the subject when imprisoned, as well as great expence in applying to other jurisdictions.

The power of taking bail in all but the most atrocious offences seems to be a necessary consequence of the criminal being presumed innocent till conviction, and therefore it is only required, that he shall be amenable to justice. It is one of the Athenian laws in Petit's collection [q]; and *Chaumeau*, in his history

[o] Stow's Chronicle, p. 525.

[p] In the year 1515 (being thirty-two years after the present statute) was published, *the Justis of Peas*, which shews that the new powers given to this magistrate, in that short space of time, did not make it safe for him to act without such assistance. The ancient Conservator of the Peace had little more to do than commit offenders.

[q] Οὐδε δῆσῳ Ἀθηναίων εἶδεναι, ὅς αὖν ἐγὼ τρεῖς καθίσῃ treason against the state

history of *Berry* [r], mentions, that the citizens of Bourges cannot be committed, provided, "*quils baillent bonne et suffisante caution, bormis en cas de crime de lese majestée.*" Which, as the customs of the several provinces do not often materially differ, may be presumed to be the general law of France.

The 9th chapter is made to restrain certain aliens from carrying on any trade or merchandise in this country, and it is remarkable, that the *Venetians, Genoese, Florentines, Apulians, Sicilians, Lucaners, and Cateloins* [s], are enumerated, without any notice of the French, or even their provinces to the *Mediterranean*. Bishop Godwyn, in his life of Henry the Eighth, mentions, that, in the year 1517, there were great insurrections in London on account of foreigners being employed, and on that occasion, with great force and liberality of sentiment, expatiates against the absurdity of such restraints.

Richard the Third did not reign long enough to hold more than this session of parliament, and yet he hath obtained, from most historians, the character of a great legislator, from this very short and imperfect specimen of what rather he intended to do for this country, than what he had either really projected, or had an opportunity of carrying into execution. Baker, in his Chronicle, commends much the laws of Richard the Third, and says, that he took the ways of *being a good king*, if he had come to *be king by ways that were good*. But he hath a much greater testimony in his favour, no less than Lord Verulam, who says, that he was an humane legislator *for the ease and solace*
of

state and burglary are indeed excepted. Thus likewise by the Roman law, "*In vincula non conjiciendus est reus, qui fidejussores idoneos dare poterit, nisi tam grave scelus admisisse eum constat, ut neque fidejussoribus, neque militibus, committi debeat.*" ff. lib. xlviii. t. iii. c. 3.

[r] Printed at Paris, 1556.

[s] I should suppose that the *Cateloins* here mentioned are the inhabitants of Catalonia: they are, however, stated to be Italians by the statute;

of the common people [1]. I shall not mention, in addition to these, the authority of Buck, who is a professed panegyrist. There is certainly a sort of fashion, if I may be allowed the expression, which prevails at different times, with regard to the characters of kings and great men. Richard hath generally been represented, both as a monster in person and disposition: if we may believe *Buck*, however, and the countess of Desmond [4], he was remarkably genteel, as well as the

and I have before this had occasion to observe, that the geography of the legislature was not, anciently, very accurate.

[1] Life of Henry VII. p. 2. Macbeth, another usurper, is celebrated by Buchanan for his excellent laws.

[4] Lord Bacon mentions (in his history of Life and Death), that this countess of Desmond lived to the age of 140 years, and that she had three different sets of teeth. She had danced with Richard the Third at a ball; and said he was well made.

In the year 1396, it was asserted by the duke of Lancaster, afterwards Henry the Fourth, that Edmund, the eldest son of Henry the Third, was hump-backed, and therefore resigned all pretensions to the kingdom for himself and his heirs. This assertion was however denied by the earl of March, who claimed from Edmund, and who insisted that his ancestor was "*corpore elegantissimus*." Lel. Coll. vol. ii. p. 309. So that the charge of Richard the Third's being crooked was not the first imputation of this kind by the Lancaster against the York family. If Richard was really himself deformed in his person, his natural son (John of Gloucester) is described, notwithstanding, to have been remarkably active and genteel.

"Rex omnibus, &c.

"Cum summa dilecti filii nostri Bastardi, ingenii vivacitas, *membra-*
"*rumque agilitas, &c.*" Rymer, vol. v. part iii. p. 162. A. D. 1485.
and 2 of Rich. III.

Fuller asserts, that Richard, besides a hump back, had a *gobber* tooth. Eccl. Hist. p. 197.

best

best of kings. It will be probably right to steer between these extremes; and, as far as relates to him as a legislator, the 2d and 3d chapters of this his only collection of laws will for ever shew, that he meant well (at least upon his accession) to the liberties of his subjects.

THE preamble to the first chapter of the laws of this session declares none, not only as it is by some supposed to have established the court of star-chamber, but likewise as it makes mention of the prevailing crimes of this time, which were supposed to call for the intervention of this extraordinary jurisdiction. "The king our sovereign lord remembreth, how by our unlawful maintenance, giving of liveries, wages, and rewards, rewards by indenture, promise, or writing, and other means of his subjects, certain damages or losses in making, murther, and other crimes, by taking of money, by justice, etc. the policy of this realm is almost ruined."

[The court is now mentioned in the future-book to be held by the name of the Star-chamber till 19 Hen. VII. c. xxi.] A Jewish court is called Star or Starva in ancient records; possibly therefore the Star-chamber might be so called from the circumstances, as the Jews had formerly judges peculiar to themselves in England, who might determine upon these crimes in that chamber. Hollander mentions that there was a Castle-chamber in Ireland, with powers similar to that of the Star-chamber in England, p. 182.

"Hence, gains were exacted then by penalties to cross religion." "Hence, for a confused mass of men, as the case, whose rebellion is still recorded, and all this are the traces and elements of civil war."

The

Allyn's Hist. of Hen. VII. London, 1638. 12mo. p. 30. [I have followed the punctuation in the common edition of the Statutes; it should however be printed, "by taking of money by justice."

The Second Parliament of the Third Year of
HENRY VII. Cap. i.

A. D. 1486.

THE preamble to the first chapter of the laws of this session deserves notice, not only as it is by some supposed to have established the court of star-chamber[w], but likewise as it makes mention of the prevailing crimes of this time, which were supposed to call for the interposition of this extraordinary jurisdiction. “The king our sovereign lord remembereth, how
“by our unlawful maintenances, giving of liveries, signs, and
“tokens, retainders by indenture, promises, oaths, writings, and
“other embraceries of his subjects, untrue demeanings of
“sheriffs in making pannels, and untrue returns, by taking of
“money, by juries[x], &c. the policy of this realm is almost
“sub-

[w] This court is not mentioned in the statute-book to be held by the name of the *Star-chamber* till 19 Hen. VII. ch. xviii.

A Jewish contract is called *Stor* or *Starrum* in ancient records; possibly therefore the Star-chamber might be so called from this circumstance, as the Jews had formerly judges peculiar to themselves in England, who might determine upon these contracts in that chamber. Hollinshed mentions, that there was a Castle-chamber in Ireland, with powers similar to that of the Star-chamber in England, p. 152.

“Statutes ’gainst riots were enacted then

“By penalties to crush sedition

“I’th’ shell: for a confused mass of men

“Is as the chaos, whence rebellion

“Is first created, and all riots are

“The feedes and elements of civil war.”

Aleyn’s Hist. of Hen. VII. London, 1638. 12^{mo} p. 36.

[x] I have followed the punctuation in the common editions of the statutes; it should however be printed, “by taking of money by juries.”

It

“subdued.” Lord Verulam, in his History of Henry the Seventh, speaks highly of this court and its powers: I shall not cite his words, as he was so great an ornament to humanity, that his failings should not be dwelt upon, but only mentioned as a proof that he was but man.

It is well known, that the power of this oppressive jurisdiction is now entirely abolished: we find, however, in the appendix to the second volume of Rushworth’s Collection, many cases there determined, which may deserve the perusal of every lawyer, though he is often to distrust the doctrine contained in them. The number of judges was from twenty-six to forty-two [y]. The lord chancellor presided; and, if the voices were equal, he gave the casting vote.

Sir Thomas Smith (in his Commonwealth of England) mentions, that this court was originally instituted to prevent the riots of disbanded soldiers, who were too much encouraged in rapine by their chieftains [z]. He likewise takes notice, that

It is well known, that in records there is no punctuation, and perhaps the statutes should be so printed, as the wrong idea arising from the improper use of these often convenient directions to the reader is not easily removed.

Crescimbeni informs us, that the full point was not known till the time of Dante. “Della Volgar Poesia,” t. ii. l. vi. c. 16. Roma, 1702, 4^{to}. See also the same author for the precise years when the other marks of punctuation were introduced. Ibid.

[y] Whitelock asserts, that every privy counsellor had a voice in this court. Comm. Parl. Writ, vol. i. p. 94. The privy council, in the time of Charles the First, did not probably exceed the number of twenty-six. Most of their proceedings in the Star-chamber are still to be found in that valuable repository of records, the Chapter-house at Westminster. See also, with regard to the forms of this court, Rymer, vol. viii. part i. p. 138. A. D. 1625. 1 Car. 1. As also Harleian Mss. N^o. 6235, which is a treatise by William Hudson Esq; of Gray’s Inn, who practised there during the reign of James the First.

[z] P. 107.

cardinal

cardinal Wolsey had greatly extended its powers, to curb some of the nobility in the north of England, and that, in his time, those who were prosecuted were generally *too stout* for the ordinary course of justice [a].

In the reign of Charles the First, the fines were often so severe, that the audience assembled to procure places at three o'clock in the morning, from the same motive that there is the greatest croud about the table, where the play is deepest:

“And at the point to give the final doom,
“The people crowding near, within *the pester'd room* [b].”

Mœstorum quod anhelatus reorum. We do not hear of the gaol distemper in other parts of Europe, which probably arises from the courts not being open to every one as with us.

Before the statute of the sixteenth of Charles the First, the court of the marches, and those of the dutchies palatine, had nearly the same jurisdiction with the star-chamber [c].

[a] Ibid.

[b] Drayton's *Polyolb.* Song 5.

[c] Rushworth, vol. ii. p. 1383.

STATUTES MADE AT WESTMINSTER,

4 Hen. VII. A. D. 1487.

THE 10th chapter of the statutes of this session enacts, that no French wines, or Tholouse woad, shall be brought into this country, but in English bottoms. Lord Verulam, in his Life of Henry the Seventh, asserts, that all the ancient laws encouraged the bringing commodities by strangers, having regard to cheapness, rather than the increase of the naval strength of the kingdom. It is very plain, that this great man's extensive knowledge did not include the statute-book, as I have already observed upon two or three statutes, with directly the same tendency; and this very law only re-enacts regulations which were before established.

The 13th chapter of this statute recites, that whereas, upon trust of the privilege of the church, divers persons *lettered* have been more bold to commit murders, rapes, robbery, theft, as well as all other mischievous deeds; therefore, if the person is not within holy orders, he is to claim the benefit of clergy but once, and, upon being convicted of murder, he is to be marked with the letter M on the brawn of the left thumb; if for any other felony, with the letter T [*d*]. Perkin Warbeck, in one of

[*d*] The letter M was plainly intended to shew that the person had been convicted of *murder*, and T denoted a conviction for *theft*: thus by 21 Hen. VIII. ch. ii. (which is printed at length by Rastal) all persons who shall *abjure* the realm, are to be marked in the hand with the letter A.

The present statute is by no means clearly worded; it is not, therefore, extraordinary that Bishop Burnet, in his History of the Reformation, should mistake in saying, that by this law the clergy were to be burnt in their hands. The bishop is, however, generally very accurate with regard to

of his Proclamations, represented Hen. VII. as an execrable breaker of the rites of holy church, for having given his assent to this act of parliament [e]. The inconvenience of the privilege of clergy was so felt in the 33d of Henry the Sixth, that the commons petition the king, that, if any person be convicted of murder, *manslaughter*, rape, robbery, or theft, it should be deemed high treason; to which the answer is, *Le Roy s'advifera* [f].

This is the first statute, however, which, in any measure, took away what is called the benefit of clergy [g]. As actual reading was at this time required [b], of which few common felons

points of this sort, and it is not improbable that his history was revised by his great patron, Sir Harbottle Grimstone, who was Master of the Rolls. His being likewise chaplain to Sir Harbottle must have introduced him to the acquaintance of the great lawyers of the time; in his history, he occasionally gives us their characters, as of *Pollexfen*, Sir *Orlando Bridgeman*, &c.

[e] Lord Bacon's Life of Hen. VII. p. 66.

[f] Petitiones in Parl. vol. v. p. 335.

[g] It is properly the *privilege of learning*, as *clergy*, in the old French, signified *science*; thus by the old proverb:

“Un poignet de bonne vie,

“Mieux vaut qu'un muy de *clergie*.”

[b] Lord Verulam says, that the bishop was to prepare the book, and the judge was to turn to what part he should think proper, vol. ii. p. 378. This contradicts the generally received tradition, which is, that the criminal was tried by reading a verse of the Psalms.

“And, if they cannot read one verse

“I' th' psalms, must sing it, and that's worse. Hudibras.

An instance is mentioned, in Dr. Grey's notes on these lines, of a criminal who obtained this privilege by reading under the gallows.

Sir Thomas Smith gives this account of the practice in the year 1565, with regard to the prisoner's claiming the benefit of clergy. “The bishop must send to every gaol delivery a proper commissary. If the
“prisoner

felons were capable, this most extraordinary privilege had not so extensive and bad consequences, as it would be attended with at present. It is true, that it now seems to be a most absurd ceremony; and though I will not insist upon its being in all respects a most unexceptionable method of shewing indulgence to a convict, so as to be an advocate for it, yet we are certainly not to judge of its propriety by the present state of this country.

Formerly none but priests could read [i]; and men so well provided for as the clergy were at this time, having also a more liberal education than the other classes of people, were not often guilty of the offences which swell the calendar at a gaol delivery. It is well known, that nineteen criminals out of twenty are indicted for larceny; a crime, for the commission of which the clergy had not the common temptation, which operates upon the poorer people, of want, or narrow circumstances.

With regard to those who were not clerks, or could not read, it was an high offence for any one to instruct them during the time of their imprisonment, so that they might be enabled to plead the privilege at the time of their trial. We find, there-

“prisoner asks his clergy, the judge commonly giveth him a psalter, “and turneth to what place he will; the prisoner then readeth as well “as he can (*God knows often very slenderly*); then he asketh the bishop’s “commissary, *legit ut clericus?* The commissary must then answer, *legit,* “or, *non legit.*” Commonwealth of England, p. 94. Lord Chief Justice Keeling fined a bishop’s chaplain, in 1665, for reporting that a prisoner could read, who was not able to do so: and upon the second trial he was refused his benefit of clergy. Eden’s Princ. of Pen. Laws, p. 173.

[i] It hath already been observed, on the seventeenth of Edward the Fourth, that many belonging to the king’s household were executed for larceny in the year 1477. These criminals therefore could not read, otherwise they would have been entitled to their benefit of clergy.

fore, in the book of *Affises* [k], that, amongst the articles to be given in charge by the judges of the King's Bench, there is one "des Gardiens des prisons qui apprennent les laiz persons qui sont en leur garde, *lettüre*, per cause de *salvation de leur viz, et desturbation de la common ley*, que la justice ne se puit parfaire per eux, comme sur laiz gens, en *deceit del roy*." This was too rigorous, however, to continue to be put in execution; and we find, in Dr. Donne's second satyre, an instance of a criminal condemned for a capital offence, prompting another who was entitled to his benefit of clergy upon reading:

"like a wretch which at bar, judg'd as dead,
 "Yet prompts him which stands next, and cannot read,
 "And saves his life —"

which extraordinary proof of humanity, in such a situation, I make no doubt Donne had been witness of.

Besides this, the clergyman underwent a trial before the ordinary [l], who, though a favourable judge, yet may be presumed to have sometimes inflicted very severe ecclesiastical punishments; and there is an instance, mentioned by *Carte*, of a priest's being not only degraded in the time of Henry the Second by sentence of a court christian, but likewise branded in the cheek with a red-hot iron [m].

With regard to the punishment of burning inflicted by this statute, it is directed to be on the left hand, both from fear perhaps of mutilation, as also from its not exposing the prisoner to so public a shame; the left hand not being so frequently used as the right. When the branding was afterwards changed from the thumb to the cheek, by a statute of Queen Elizabeth, the preamble of the act of king William, which re-establishes this first method of burning on the left thumb, recites, that,

[k] P. 138.

[l] Becket rested his dispute chiefly on this previous examination, and the principle, that no one is to be twice tried for the same offence. See Fitz-Stephen.

[m] Vol. i. p. 581.

by

by the mark being more apparent, the criminals became more abandoned [n].

As transportation is now become the most common sentence of criminals [o] since the establishment of our colonies in America [p], it may not be improper here to consider, whether it continues to answer the purposes for which this mode of punishment was originally instituted. Our American settlements are now in such a state of prosperity, that it cannot be supposed to carry the terror that it did in the last century; it should therefore seem proper, the condition of pardon should now be, that the criminal be transported to Falkland's Islands, or other (if there be such) more desolate place [q].
It

[n] "Coli rura ergastulis pessimum est, damnatis manus, *inscriptis vultus.*" Pliny. Favyn (in his Théâtre d'Honneur) mentions, that the cutting off an ear was anciently a very common punishment in France, and that it was always the left ear, because *Hippocrates* hath supposed, that the loss of the right occasions impotence. Vol. ii. p. 1731.

[o] The first statute, which inflicts the punishment of transportation, is the 39 Eliz. ch. iv.

[p] It is likewise the punishment in all other countries, which happen to have colonies: thus the *Danes* transport to *Tranquebar*; and the *Spaniards* to the least-cultivated part of their very extensive dominions of desert in South-America. The Chinese employ their criminals in the repair of the great wall, to which they are banished. (*Renaudot*, citing *Navarette*).

The most common sentence for convicts in Austria is, to confine them under ground in the famous quicksilver mines at *Idra*, as that government hath no colonies for the purpose of transportation. The Romans also often sent their refractory slaves, *in metallum*.

Herod issued a proclamation, that thieves should be sent out of Judea, and sold as slaves. This occasioned a rebellion, however, as *Zonaras* observes, that the punishment before was only confinement for six years within the Jewish territories. Annal. l. v. c. xvii. Venetiis, 1729, Folio. It is an old, but true saying, *that home is home*; and the Laplander repines as much at banishment, as the inhabitant of the more temperate climates.

[q] By an account of a voyage to the East-Indies in 1614 (which is annexed

It was thought in the fourteenth and fifteenth centuries to be so dangerous a voyage to the East or West-Indies, that the crews of both *Columbus* and *Vasquez de Gama* consisted in part of criminals, who were pardoned upon condition of embarking in those expeditions [r]; and, long after this, they were supposed to be liable to still greater dangers on shore. These terrors are now in a great measure vanished; the passage is also considered as a voyage of pleasure, during which they are perfectly idle, and therefore in the very state they would wish. When they are landed, they are exposed, not to wild beasts and savages, but become servants to their own countrymen, who speak the same language, and have contracted the same habits of living to which they have been used in the mother-country. It should therefore seem, that the

ed to an English translation of Pietro della Valle, printed at London in 1665), I find, that, at the desire of the East-India company, James the First pardoned ten criminals, on condition that they should be transported for life to *Soldania*, which is a part of the western coast of Africa, not far distant from the Cape of Good Hope; and that three other criminals were sent to the same place the following year, viz. 1615. Two of these convicts, however, not being able to bear the banishment to this barbarous part of Africa, returned to England, and were executed, p. 333, & seq.

It appears, by Sir *John Strange's Reports*, that when, after the peace of Utrecht, we became possessor of Mahon, the criminals were frequently transported to Minorca.

Petrarch (in one of his letters) gives a description of a most extraordinary storm which happened at Naples in the year 1343. There were 400 criminals on-board a large vessel in the harbour, whose punishment was changed from death to transportation to Sicily. This vessel, so loaded with every kind of villany, was the only one which outlived the storm, and was saved. *Mem. de Petrarche*, vol. ii. p. 167. Lucan, however, justly says,

— servat fortuna nocentes.

[r] Herrera.

6

place

place to which the criminals are transported [s] should be altered or perhaps a new punishment substituted in the room of it. Confinement in the dock-yards hath been proposed in parliament, and the bill passed the lower house without any material opposition.

Maupertuis, in one of his dissertations, hath advised likewise, that criminals, whose lives are forfeited, should be pardoned, on condition that some hazardous experiment, for the promotion of medical knowledge, may be tried upon them. Those, who start at the supposed inhumanity of this proposal, should consider whether certain death, or a chance of surviving, is the greater mercy to the criminal; and surely this milder punishment is not more severe, by the probability of the experiment's becoming of general utility to mankind. The practice of inoculation was first tried upon some convicts, who not only survived themselves, but have saved, and will continue to save, the lives of thousands [t].

I can-

[s] Since the defection of the American Colonies, this policy for the more atrocious felonies hath been adopted, with regard to New South Wales*. I have been informed, that there hath been an instance, within these twenty years, of a criminal rather choosing to be executed, than transported: this instance, however, is too singular to be argued from. It hath before been observed, that criminals were sent to the Gallies during the reign of Q. Elizabeth, and, in the year 1602, a special commission issued, entitled, "pro condemnatis ad galeas transferendis." The introduction recites, amongst other things, "that it is right offenders should in such sort be corrected and punished, that even in their punishments they may yield some profitable service to the commonwealth." See Rymer, vol. vii. part ii. p. 36. The commission includes all the great officers of state, so that it was thought to be of much importance to change the common method of punishment.

[t] It appears, by the Philosophical Transactions for the year 1667, that the transfusion of blood, from which so great benefits were at that time expected, was tried upon *Anthony Maurex*, who is stated to have been a madman; it is supposed, however, that his insanity did not appear till

* The distance and expence, however, are much too great.

after

I cannot pass unnoticed the 24th chapter of these laws, as Lord Bolingbroke, and many other writers, have styled it (κατ' ἐξοχην) *The statute of Alienations*, and have dated the influence of the commons as commencing from perpetuities and entails being now first abolished. The estate of a tenant in tail, however, is so far from being destroyed by the statute, that his interest is saved, if he makes any claim within five years [u]. The power of alienation, therefore, at this time, did not arise from this law, as supposed, but from the determination of the judges in *Taltarn's case* [w], in the reign of Edward the Fourth, by which that most extraordinary of legal fictions, the common recovery, was established. The statute is indeed very inaccurately and obscurely penned, as we find by the preamble to the 32d Hen. VIII. ch. xxxvi. which, five and forty years after the passing this law, binds the tenant in tail immediately, without allowing him the five years to pursue his claim. Lord

after his condemnation at the *Chatelet*, as otherwise he would not probably have been convicted. I must own, I was rather surprized to find, that the dissecting criminals whilst alive had been practised in the western empire, or perhaps earlier, by the Greek physicians; and the Byzantine historian takes notice of this in a manner, which does him too much honour, not to insert his own words: ἡ ἰατρικὴ τέχνη ωφελίμων τι ποιῆσαι τῇ ἀνθρώπινῃ φύσει σπαρασσά, ζωῆας ἀνθρώπους ἀνέτεμεν· ἀλλὰ ἦν μὲν καὶ τὸ αἰδικόν, τοῖς διὰ τὴν ἑτέραν σωτηρίαν ζωῆας ἄλλους θυεσθαι. Τί οὐκ ἐποιοῦν οἱ ἀρχαῖοι; τὸν καὶ ἀκριβέστερα θανάτῳ ὑποπέσειν διὰ ληΐαν, ἢ φαρμακείαν, τοῦτον λαμβάνοντες ἀνέτεμον ζωῆαι, οὐτε κολάζοντες τὸν κολαζόμενον, καὶ τῇ ἀνθρώπινῃ φύσει βοήθειαν ἐφευρισκόντες. Michaelis Glycæ Annal. p. 2. c. x. p. 119. Venet. 1729. inter Byz. Script.

[u] It seems to have been conceived by some indeed, that the tenant in tail (*party to the fine*) was bound by this statute, which is very confused and inaccurate; but it appears, by the title and preamble, that the chief intention of the legislature was by no means to give the tenant in tail any new powers of alienation, but only to make fines with proclamations a most complete bar against dormant claims.

[w] 12 Edw. IV. 14. 19.

Bacon,

Verulam, in his life of Henry the Seventh, speaks thus of this statute: "As the king himself had in his person and marriage made a final concord and agreement in the great suit for the crown, so by this law he settled the like peace in private possessions of his subjects." Lord Verulam further adds, that "this law only revived a more ancient statute, which was likewise made in affirmance of the common law." He then observes, that "statutes of *non claim* are proper for turbulent times, as statutes to quiet possessions are for peaceable ones."

The statutes of the present, and the next session of parliament, were printed by Wynken de Worde, and likewise by Julian Notary in 1503: it is said also, that now first began the custom of prefixing titles to the statutes [x]. A title is properly no part of an act of parliament; it not being read three times as every other part of a law is, and is only proposed when it is to be sent from one house of parliament to the other. As arguments are, however, frequently drawn from the title of a statute, it is to be wished that there was a little more attention to the settling of it. For example, who would expect to find a most material alteration of the statute of *Distributions*, in a law, the title of which is, *An Act for the revival and continuance of several acts of parliament* [y]? It becomes indeed impossible, when statutes relate to matters of a very miscellaneous nature, that the title can be coextensive with the views of the legislature: it is, therefore, to be wished, that such acts of parliament were distinct laws, and not thrown together in that very strange confusion, which hath now obtained the name of a *hodge-podge* act. It must be admitted, that the ancient statutes

[x] Lord Raym. 77. Hardr. 324. Instances have however before this occurred.

[y] 1 James II. ch. xvii. § 8.

are much more faulty in this respect, than the more modern ones: some titles to acts are even ridiculous, as 19 Hen. VII. ch. vi. *Pewterers Walking*. I find however in the statutes of that year, printed by Pynson, these words, viz. "*in the country*," are added. The purport of this act is to prevent tinkers, who have no certain place of residence, from interfering with the trade of the brasiers and pewterers.

STATUTES MADE AT WESTMINSTER,

11 Hen. VII. Cap. i. A. D. 1494.

THE first chapter of these statutes is a most humane and wise law, made for the protection of those who have assisted and supported the king in possession of the crown, whether his title be a good one or not; as the preamble recites it, “*to be the duty of the subject to serve their prince, and sovereign lord for the time being [z].*” Henry the Seventh was now in peaceable possession; and we must look upon the statute to have been chiefly made with a view to secure the crown to himself and his descendants. Every subject was now strongly interested to

[z] What acts of a king *de facto*, and not *de jure*, shall bind his successor, was agitated in the case of *Bagot and Ives*, which is reported in the Year Book of the ninth of Edward the Fourth, during the terms of Hillary and Trinity of that year. It is very difficult to say upon what points the courts determined; but it should rather seem, the judges were of opinion, that all acts of the king *de facto* (which were not highly prejudicial to the great and fundamental rights of the crown) would bind the successor; nor do the judges or counsel seem to consider it as tender ground. See also Bedford’s * Hereditary Right of the crown of England, p. 111, & seq. It is likewise mentioned in the Year Book of the fourth of Edward the Fourth, Term Pasch. p. 20. that Sir *Ralph Grey* was beheaded, “*per cause de son perjury, et doubleness que il avoit fait al Roy Henry le size jadis Roy, et auxi al Roy Edward le Quart, que ore est.*” See Blackstone, Vol. I. p. 371—8.

Fuller hath given us rather a quaint, but, at the same time, strongly descriptive account of the perilous situation of the subject before this wise

* I am informed that this book, though usually ascribed to the Rev. Mr. Hilkiah Bedford, was in reality written by the Rev. Mr. Horbin; and the preface, by the Rev. Mr. Theophilus Downs. I am also referred to Tillotson’s Life, by Dr. Birch, 2d Edit. with regard to these particulars.

to appear in arms on his behalf; as, if they were overcome by the *Perkin Warbeck*, or other *Pretender*, they might still plead this law to protect their persons and fortunes. After the Restoration, many, who had submitted to the commonwealth and protector, insisted upon the equity of this statute, which was denied them, upon a strict construction of the word *king*; and it is wisely observed, in the *Considerations on the law of forfeiture*, that the construction of a statute of this kind *will always be a political one.*

The provisions of this statute (after the frequent wars, and changes of kings, whilst the throne wavered between the two rival houses) became absolutely necessary, as he who got possession of the kingdom was obliged to prosecute his opponents, if not from motives of revenge, merely to gratify his needy followers with the consequential forfeitures. It is said, that a bill of pardon is read but once in each house of parliament; the reason for which possibly might have arisen from a desire to secure estates from forfeiture, before the king could be otherwise advised. Hence possibly likewise the particular form, by which the king is thanked for such a bill: "*Les prelates, seigneurs, et communes, en ce parlement assemblez, au nom de tous vos autres sujets, remercient tres humblement votre Majesté, et prient Dieu de vous donner en santé, bonne vie, et longue.*"

Lord Verulam [a] calls the present statute a law of a strange nature, *more just than legal*, and *more magnanimous than provident*: the distinction, however, between *just* and *legal*, does not seem to be a very clear one, or to do honour to the sentiments of this great writer.

statute. "For they lived in a troublesome world, wherein the cards were so shuffled, that two kings were turned up trumps at once, which amazed men how to play their games." Fuller's Holy State, b. iv. ch. viii.

[a] Life of Henry the Seventh.

The 4th chapter settles the cities and towns which are directed to keep a standard for measures. I have had occasion to remark, in the observations on Magna Charta, how ineffectual all regulations of this sort have ever been in all countries; and one great reason for every one's being unwilling to submit to them arises from the abuses of office in the clerks of the market, who generally pervert their powers to the purposes of extortion [b]. This is dwelt upon in a charge, which was given by Sir Edward Coke, to the grand jury of Norwich, in 1607. His words are these; "The clerk of the market will come down, and call
" before him all weights and measures: if there is a fault, he
" and the informer share the penalty, but never redress the
" abuse: it was once my hap to take a clerk of the market in
" these tricks; but I advanced him higher than his father's
" son, by so much as from the ground to the top of the pillory.
" If you of the jury, therefore, will present these offences, by
" God's grace they shall not go unpunished; for we have a
" coif, which signifies a scull [c], whereby, in the execution of
" justice, we are defended against all oppositions [d]." It must be admitted, that the chief-justice seems to express himself with rather too great warmth against this abuse; but, as it was the first charge which he had occasion to deliver in his native county of Norfolk, he seems to have been rather too desirous of popularity.

[b] See Riley's Pl. Parl. p. 568.

[c] In a speech of Sir Edward Coke (made upon a call of serjeants), he compares the serjeant's coif to Minerva's helmet, *who was the Goddess of counsel*: he likewise says, "that the four corners of their cap import *science, experience, observation, recordation*." Petyt, Mss. vol. li. p. 135 and 136. B.

[d] An information was moved for against the clerk of the market for extortion, even so late as the sixth of George the Second. Barm. Rep. p. 310.

The

The 17th chapter is entituled, *The forfeiture for taking of fessants [e] and partridges, or the eggs of hawks [f] or swans*. The preamble recites the great injury to lords of manors, not only from the loss of *pleasure and disport* to their friends and servants, but likewise “*of the profit and avail* that by occasion should grow to “*their household*.”

What are called *Game Laws* are peculiar to the more northern parts of Europe; they seem not to have been even thought of by the ancient Greeks and Romans. Plato [g] says, μηδ' αυ πανηων θηρας αιμυλος ερωσ (ε σφοδρα ελευθεριος) επελθοι, which shews the diversion to have been thought illiberal. And Sallust, in the introduction to his history, boasts, that he had not mispent his life in the *servile* pursuits of either hunting or agriculture. Falconry first occasioned the enacting such laws; and hence herons were held in high esteem, being the noblest bird the hawk could fly at. If they could not procure herons, then any other large bird afforded diversion; therefore, by the laws of Hoel Dda, in the book of Triades, “*Tres sunt aves, “quas in fundo alieno occidere non licet—et grus, et corvus [h].”*

[e] In the time of Queen Mary, there was not only a keeper of pheasants and partridges to the queen, but likewise a *taker*. The kings of England had also, formerly, a swanherd, and Sir Edward Coke makes this office one of his titles in the fourth Institute. Charles the First had a tamer of cormorants, for the purpose of fishing with these birds. White-lock's Memoirs.

[f] Notwithstanding the penalty for taking the eggs of hawks, the falcons of this country were never in great repute; the more northern the latitude the better the hawks, and those of Iceland are particularly famous. Hence likewise they are protected by the laws of the northern nations. See Stiernhook, l. ii. c. viii.

[g] De Leg. lib. vii. p. 642. Lugduni, 1590.

[h] P. 334. If the king's falconer killed a heron, the king was obliged to hold his horse whilst he took up the dead game, as also his stirrup whilst the falconer mounted a second time. Ibid. p. 25.

Since

Since this statute of Henry the Seventh, the laws for the preservation of the game have been much multiplied, and with severe penalties [i], as it is supposed to decrease daily. It will, however, in time be discovered, that the practice of shooting at the bird on the wing is the real occasion of this diminution [k].

By

[i] The executing the laws for the preservation of the game with great severity was the occasion of a general rebellion of the peasants in Germany, about the year 1524, in which 50,000 of them are said to have been slain. Jortin's Life of Erasmus, vol. i. p. 335. "But there are
" some covetous, rigid persons, whose souls hold no sympathy with
" those of the innocent anglers, having either got to be lords of royalty, or owners of land adjoining to rivers, and these do by some
" clownish nature and education, for the purpose, insult and domineer
" over the innocent angler, beating him, breaking his rod, or at least
" taking it from him, and sometimes imprisoning his person, as if he was
" a felon—Whereas a true-bred gentleman scorns those spider-like attempts, and will rather refresh a civil stranger at his table, than warn
" him from coming on his ground on so innocent an occasion." A short discourse touching the laws of angling, printed at the end of the 3d Edit. of Walton's Angler.

Lord Hales hath made the following observation on the statutes in Scotland for the preservation of the game: "There are not so many
" variations in any part of the law of Scotland, as in that which respects
" the *close time*; they who suppose the law to be fluctuating, because
" framed by lawyers, are entreated to remark this circumstance." Specimen of observations on the Scotch statutes, which the public may hope to receive from his Lordship, p. 23. The 5 of Ann. c. 14. hath false grammar in no less than six places, being probably drawn by the country squires. Sayer, on Costs.

[k] As this is looked upon at present to be the only fair sporting, and the decrease of the game is not only attributed to other causes, but is productive of statutes attended with some rigour, this assertion may possibly seem to require some proof. Less than a century ago, when a bird was once on the wing, the shooter dropped his gun, despairing to hit it; and I have myself conversed with old men, who could find all sorts of game on the ground. The consequence of this was, that the

gen-

By 19 Hen. VII. ch. iv. no person may shoot with a cross-bow without the king's licence, except he be a lord, or have two hundred mark land; which may possibly have occasioned the common notion, that it is unlawful to shoot with *what is called white, or silent powder*. His successor (Henry the Eighth), on the 7th of July, in the twenty-seventh year of his reign, issued a proclamation, reciting his great desire "to preserve the
 "partridges, pheasants, and herons, from his palace at Westminster, to St. Giles's in the Fields, from thence to Islington,
 "Hampsted, Highgate, and Hornsey Park; and that, if any
 "person of any rank or quality presumed to kill any of these
 "birds, they were to be imprisoned, as also suffer such other
 "punishment as to his highness should seem meet [1]."

The same sort of proclamation issued in 1459, signed by the duke of Somerset; as also another in the fourth of Philip and Mary, which, in the neighbourhood of Greenwich [m], besides

par-
 gentleman had no other amusement, but *what is now called poaching*; and, in the reign of Charles the Second, a very costly and pompous book (in folio, with engravings) was published, with the title of *The Gentleman's Recreation*, in which there are copper-plates, representing tonelling, and all other kinds of snares. This treatise was in so great repute at the time of its publication, and was considered as being of such general utility, that it was abridged in the Philosophical Transactions, for the year 1675. The greater plenty of game, which is said to be in France than in England, I take to be a confirmation of this conjecture. I have been informed, that few of the French shoot; on the contrary, they sell their game at market, which brings a better price likewise when taken in a snare, at the same time that the expence of gun-powder is saved.

[1] Coll. of Procl. penes Antiq. S. vol. i. p. 210.

[m] The island, opposite to Greenwich, obtained the name of the *Isle of dogs*, from the king's spaniels being kept there. Edward the Third, in the twenty-first year of his reign, ordered the sheriffs of Essex and Hertfordshire to build bridges in the neighbourhood of Waltham, that he may enjoy the amusement of falconry: he also forbids any one's hawking
 ing

partridges and pheasants, includes the *mallard*. It is remarkable, that this proclamation makes no mention of imprisonment, as the punishment for those who should infringe it [n].

Stiernhook observes, that the game laws amongst the Swedes have never been thoroughly carried into execution: "Sed hæ
"leges, quamvis sæpius tot regum edictis munitæ, raro tamen
"observantur, ubi libertatis quisque pristinæ memor, et tenax,
"suo se jure uti putat [o]." The severest law for killing any kind of bird seems to have been that of the Egyptians, mentioned by Herodotus, ος δ' αν ειπ η ισηκα, ην τε εκων, ην τε αεκων, αποκλεινη, τεθναναι αναγκη [p]. The destroying of birds nests is forbidden, Deut. xxii. 6. The Athenians executed Atarbes because he had whipped a sparrow (σπερθον) sacred to Hercules, till it was killed [q].

The 21st chapter recites, "*That perjury is much and customarily used within the city of London, amongst such persons as passen and been impannelled in issue, joined between party and party.*"

This offence hath been before this statute complained of in preambles to several laws [r], being always the perjury of a juror, who finds a verdict contrary to his oath, and not that ing in those parts without his most special licence. See Rymer, vol. iii. part i. p. 23.

Charles the First, in the year 1634, issued a proclamation against the use of setting dogs. See Rymer, vol. viii. part iv. p. 90.

[n] Coll. Procl. vol. ii. p. 156.

[o] De jure Sueonum vetusto, l. ii. c. viii. By the Russian law, the snares used in what we should call *poaching* are particularly protected. "Si quis aucupii gratiâ decipulas vel pedicas tetenderit, aut alia quælibet instrumenta aptaverit, aliquis vero malo effectû hæc destruxerit, et aves abegerit, solvat ei damnum juxta æstimationem faciendam." Statuta Moschovitica, c. 7. S. 216. published at the end of the Baron de Mayerberg's Embassy to Moscow.

[p] Euterpe, ed. Gale, p. 115.

[q] Ælian, l. v. c. xvii.

[r] 38 Edward III.

N n n

which

which we hear too much of at present, in the witnesses produced at a trial.

In *the Dance of death*, written originally in French by Macchabrel, and translated by John Lyngate in this king's reign, with some additions to adapt it to English characters, a jurymen is mentioned, who had often been bribed for giving a false verdict, which shews the offence to have been very common. The sheriff, who returned the jury, was likewise greatly accessory to this crime, by summoning those who were most partial and prejudiced. Carew, therefore, in his account of Cornwall, informs us, that it was a common article in an attorney's bill, to charge *pro amicitia vicecomitis*.

It is likewise remarkable, that partiality as well as perjury in jurors of the city of London is more particularly complained of than in other parts of England, by the preamble of this and other statutes. Stowe informs us, that, in the year 1468, many jurors of this city were punished, by having papers fixed on their heads, stating their offence of being tampered with by the parties to the suit. He likewise complains, that this crying offence continued in the time of Queen Elizabeth, when he wrote his account of London [s]; and Fuller, in his *English Worthies*, mentions it as a proverbial saying, *That London juries bang half, and save half*. Grafton also, in his *Chronicle*, informs

[s] "There was another set of men, that his honest heart [sc. Stowe's] was set against, who affected and strove to be jurymen, and who oftentimes for reward were perverters of justice. He called them the ring-leaders of inquests, making a gainfull occupation of it. Such as laboured to appear at Nifi Prius's before they were warned, or procured to come on as *tales*, and such as procured to be foremen when they could, and then took upon them to overrule the rest in their opinion. Such an one would be laboured by plaintiff or defendant, &c." He added, "how he knew one of these who was carted and banished out of Billingsgate Ward." Strype, in his *Life of John Stowe*, p. xxv.

us,

us, that the chancellor of the diocese of London was indicted for a murder, and that the bishop wrote a letter to Cardinal Wolsey, in behalf of his officer, desiring the attorney-general would stop the prosecution, "*because London juries were so prejudiced, that they would find Abel guilty of the murder of Cain.*"

The punishment for a false verdict by the petty jury is by writ of attaint [t]; and the statute directs, that half of the grand jury, when the trial is *per medietatem lingue*, shall be strangers, instead of Londoners.

"And there's no *London jury*, but are led

"In evidence as far by common fame,

"As they are by present deposition [u]."

There is no statute against the perjury of a witness till 5 Eliz. ch. ix. Is it not therefore extraordinary that the Mexicans [w], when first conquered by the supposed more civilized Europeans, should have punished this offence with death?

[t] It appears by 15 Hen. VI. ch. v. (which likewise recites the great increase of perjury in jurors, and in the strongest terms) that in every attaint there were thirteen defendants, viz. the twelve jurors who gave the verdict, and the plaintiff or defendant who had obtained it, who therefore was supposed to have used corrupt means to procure it. For this reason, if the verdict was given in favour of the crown, no attaint could be brought, because the king could not be joined as a defendant with the jury who were prosecuted.

[u] Ben Jonson's *Magnetick Lady*, Act iii. Sc. 3.

[w] Herrera.

STATUTES MADE AT WESTMINSTER,

12 Hen. VII. Cap. vii. A. D. 1496.

THE seventh and last chapter of the statutes of this session is entitled briefly, *Murder*: the preamble recites, that one *James Grame, yeoman*, had assassinated his master *Richard Tracy*, at Brentwood, in Essex: the criminal, as the law then stood, having a right to claim the benefit of clergy [x], this statute deprives him of this privilege; and likewise enacts, that if any lay person, afterwards, shall murder his lord, master, or *sovereign immediate*, he shall suffer capitally [y]. I should, therefore,

[x] In the fourth year of Henry the Eighth, the abbot of Winchcomb preached against the taking away this privilege, upon the text of *Nolite tangere christos meos*; he was opposed in that convocation with great warmth and liberality of sentiment by Dr. Standish. Burnet's Hist. Ref. vol. i. p. 72. See a more circumstantial account of this, in Keilwey's Reports, p. 180, B. et seq.

[y] I find but one instance of a criminal's not claiming the benefit of clergy, which is that of the duke of Somerset. [Hayward, in his life of Edward the Sixth, p. 137. Quarto.] It appears, however, by Bishop Burnet's account of his trial, that he had no council to assist him, and therefore might possibly be ignorant that he was entitled to this privilege. We have indeed no very accurate relation of this duke's defence, though there is a short state of the proceedings in the seventh volume of the State Trials: the form of the indictment, however, is inserted in Coke's Entries, p. 482. by which it appears to have been a complicated charge of treason and felony, and therefore most certainly illegal. His peers acquitted him of the treason; and it is generally agreed that the evidence of the felony (of which he was found guilty) by no means brought his case within the statute, upon which the prosecution was endeavoured to be supported.

think,

think, as the preamble recites this particular case of petit treason, and concludes by taking clergy from those who should be convicted of this species of murder, that, though the word *murder* is used in one part of the preamble, the true construction of this law, which in effect punishes with death, should not extend further than to petit treason, though the title makes no mention of treason, but on the contrary consists of the single word, *murder*. This doubt, which I have ventured to state, is now become a mere point of speculation, as 23 Hen. VIII. ch. i. hath expressly taken away the benefit of clergy from murderers. I should be inclined, however, to think, that those criminals, who may have been executed between the present statute's passing, and the twenty-third of Henry the Eighth, did not suffer according to law.

It seems, indeed, very extraordinary, that this most horrid of crimes should have been entitled, for so many centuries, to such a false mercy and indulgence: I have, however, before observed, that this privilege, anciently, could only be claimed by those few who could actually read; and that if any one presumed to teach a criminal whilst in prison, it was considered as a misdemeanor. It likewise seems most singular, that this most atrocious of crimes should have been punished capitally in so few countries, when not only the dictates of natural justice seem to require such a retaliation and atonement, but likewise by the most ancient of all laws, that of the Jews, *blood was to be shed for blood* [z].

In the Hometical times murder was punished by a wergild, or banishment:

[z] In the neighbouring state of Persia, however, both Herodotus and Briffon informs us, that the kings of that country never permitted a criminal to be punished for the first offence; which is in effect the same thing with our benefit of clergy.

— και μεν τις τε κασιγνητοιο φονοιο

Ποινην, η ε παιδος εδεξατο τεθνεωτος·

Και ρ' ο μεν εν δημω μενει αυτε, πολλ' αποτισας,

Τε δε τ' ερητευεται κραδιη, και θυμος αγηνωρ,

Ποινην δεξαμενε.

Iliad. I. 629.

Λαοι δ' εν αγορη εσαν αθροοι· ενθα δε νεικος

Ωρωρει, δυο δ' ανδρες ενεικεον, εινεκα ποινης

Ανδρος αποφθιμενε.

Σ. 497.

which wergild seems to be singled out, in the description of Achilles's shield, as the most common subject of dispute in a court of justice.

There are likewise passages in the *Odyssæy*, which shew, that the murderer was not looked upon with horror, as Minerva, under disguise, and pretending to be an old friend of Ulysses, speaks highly in his praise, when he went to procure some poison for arrows, which were never used in those times against an enemy in battle:

Φαρμακον ανδροφονον διζημενος, οφρα οι ειη

Ιες χρεισθαι χαλκηρεας·

Odyss. A. 261.

The suitors of Penelope afterwards suppose, that Telemachus, with whom they live upon tolerable terms, is gone to a neighbouring island,

— οφρ' ενθεν θυμοφθορα φαρμακ' ενεικη,

Εν δε βαλη κρητηρι, και ημας παυλας ολεσθη.

Odyss.

Minerva likewise advises to destroy the suitors:

— ηε δολω, η αμφαδον —

which is very extraordinary instruction to be given by a deity; especially as the whole crime in these guests was the trespassing, perhaps, too long upon Telemachus's hospitality.

By the laws of the twelve tables, murder was punished with death amongst the Romans; but by the *Lex Porcia* all capital sentences might be remitted for that of banishment, as appears

by the famous speeches of *Cæsar* and *Cato* in Sallust [a]. Horace seems to class an assassin only with an adulterer :

Si mæchus foret, aut sicarius, aut aliqui

Famosus.

If we may credit also the accounts of more modern travellers, this most atrocious crime is still practised in Italy with a degree of impunity, and often in the face of the sun [b].

Fynes Morryson, in some measure accounts for this neglect in prosecuting a murderer, by taking notice of its being peculiar to England, that any one may arrest the criminal ; he observes that in Italy, on the other hand, and most parts of Europe, no one can interfere on these occasions, but an officer of justice, who is probably at a great distance from the spot [c]. Assassination is said, likewise, to be still not uncommon in Spain and Portugal ; and amongst the defences, which a person accused

[a] Some crimes, however, were punished with death in the time of Martial, as, after describing Laurentius's punishment on the cross, he adds :

“ Denique supplicium dederat necis ille paternæ,

“ Vel domini jugulum foderat ense nocens ;

“ Templa vel arcano demens spoliaverat auro ;

“ Subdiderat sævas vel tibi, Roma, faces.” De Spectaculis.

[b] The following story is told in the Poggiana.—A country fellow of the kingdom of Naples confessed that he had been guilty of a most enormous crime, no less than having used a spoonful or two of milk in Lent—Upon the confessor's asking him if he had no other sins to repent of, he answered immediately no—The confessor then desired to be informed, whether he or his neighbours had not stripped or murdered a traveller lately—Yes, replied the countryman ; but this happens so commonly, that we do not look upon it as a crime. Vol. ii. p. 185. Amsterdam, 1720.

[c] Part iii. p. 26.

of

of murder might formerly, at least, insist upon, the first mentioned is that the person slain was *su enemigo conocido* [d].

It is well known that the wergild, or satisfaction to the relations of the person murdered, was thought sufficient atonement amongst most of the nations of Europe, after the declension of the Roman Empire; there is therefore amongst the laws of *Athelstan*, collected by *John of Brompton*, a general head thus entitled: "Cujus ætatis, et pro quo pretio, aliquis sit occidendus." Thus likewise by the laws of *Ina*, qui "puerum genuerit et necaverit, non habeat interfecti *weram*, sed rex et dominus." One of the principal reasons given in the *Speculum Regale*, why much solicitation was made to belong to the king's court in Norway, is, "that if he is killed, the murderer must pay a higher fine than if he was not an *aulicus*, or courtier." The heavier therefore this mulct, the greater protection and security to the person whose life was valued at such higher rate [e]. It appears by 26 Hen. VIII. ch. vi. that compositions for murder were then not uncommon in *Wales*; as it does also by *Krebs*, in his treatise *De ligno et lapide*, that they still continue in *Saxony* [f].

Tacitus

[d] *Fuer. Real de Esp.* 245. "Nullus qui suum occiderit inimicum, debet secum aliquid de iis quæ invenerit asportare, ne portius *prædonis*, quam *inimici* notam incurrere videatur." *Fueros de Arragon*, p. 166. This law seems even to honour the assassin under the name of an enemy.

[e] See *Speculum Regale*, p. 253, 260.

[f] It appears, however, by *Lindenbrog* and *Baluzius*, that this custom (even anciently) did not prevail in all parts of Germany. *Petrus de la Marca*, indeed, gives an account of a wergild of three cows, which hath been paid from the most remote antiquity by one parish in the Pyrenees, to a neighbouring district on the first of June annually, as a satisfaction for the murder of three persons. *Marca Hispanica*, p. 68. But the most singular of these payments is by the laws of *Canute*: "If murder be committed in a church, the satisfaction shall be paid to *Jesus Christ*"

Tacitus gives us the reason of this very singular custom's prevailing amongst the Germans, "Luitur homicidium certo
 "pecudum vel armentorum numero, recipitque satisfactionem
 "universa domus, utiliter in publicum, quia periculosiores sunt
 "inimicitiae juxta libertatem." What Tacitus thus observes with regard to the uncivilized Germans is applicable to most barbarians, as they are particularly addicted to revenge. Grotius seems even to commend the trial by battle for the same reason:
 "Minus certe malum erat duorum periculo decertari, praesertim
 "postquam ambo moniti essent serio, ne contra conscientiam
 "armis Deum sibi inimicum accerferent, quam totas familias
 "committi inter se, et bellum civile excitari [g]."

Boulainvilliers, in his Abridgement of the history of France, informs us, that if the criminal himself could not pay the *wergild*, his relations were liable: and in another place he says,
 "Le Franc ne couroit jamais risque de sa vie, que dans les com-
 "bats." *Stiernhook* also observes, that amongst the ancient Swedes and Goths, "leges raro capitis etiam quantocunque
 "crimini imponunt supplicium, si modo reus *par mulctae*
 "fuerit [h]."

The instances, which I have hitherto mentioned, are confined to Europe; but *Herrera* informs us, that the Mexicans punished murder by a *wergild*; it should seem, likewise, that this custom is spread over most parts of Asia, though the Koran hath, in part, adopted the Mosaical law [i]. Modern travellers, and
 lady

"*Christ*, the king, and the relation." Wilkins, Leg. Angl. Saxon.

[g] Grotius, De Historia Vandalorum, Gothorum.

[h] P. 128.

[i] "O! true believers, the law of *retaliation* is ordained you for the
 "slain; the free shall die for the free, the servant for the servant, and a
 "woman for a woman; but he, whom his brother shall forgive, may
 "make satisfaction according to what is just. This is indulgence from
 "your Lord, and mercy." Sale's Koran.

O o o

A very

lady Mary Wortly Montague in particular, mention that little inquiry is made about a murder at this day in Turkey. "It is the business of the next relation to prosecute; and if they like better to compound the matter (as they generally do), there is no more said of it [k]." Gemelli likewise informs us, that, in the Mogul's territories, a wergild is due to the relations; but that it is reckoned dishonourable to claim it [l].

I should apologize for the length of these observations, and the many authorities I have cited, to shew, that murder, by most laws, hath not been attended with its proper punishment of death, which, indeed, is not a sufficient atonement for the crime, did it not tend to make every Englishman happy to be born in the present times, when a just horror is conceived of this most atrocious of offences [m].

A very whimsical case upon the law of retaliation is put by Diodorus Siculus, in his account of the Sybarites. A man, who was blind with one eye, loses the other by a malicious blow; it was much doubted by the Sybarite judges, whether the maimer should not be deprived of both his eyes. Mem. of the Acad. of Inscript. vol. ix. p. 175.

[k] Vol. iii. p. 39.

[l] Having said so much with regard to the *wergild*, or *weregild*, it may not be improper to mention that it is derived from the two Anglo-Saxon words *pen vir*, and *geld solutio*.

Stiernhook informs us, that, in the ancient laws of Sweden, the wergild is termed *Oranboth*, i. e. "satisfactio pro evitanda inimicitia." Some of these ordinances likewise made a distinction between what is to be paid for the murder of different foreigners, as so much for an Englishman, so much for a Dane. Ibid. p. 358.

[m] A most extraordinary species of melancholy and horrid madness hath prevailed of late in Denmark. These enthusiasts have persuaded themselves, that it is a meritorious act to commit deliberate murder, in order that they may have the merit of atoning for it by a public execution and contrition for their crime. This diabolical sect is become so numerous, that the king of Denmark hath been obliged to direct, *they shall not be executed*, but condemned to a life of infamy and pain.

This is the last statute of Henry the Seventh which I shall have occasion to make any observations upon. It is well known, that this king hath had an express panegyrist in the great Lord Verulam; who, however, is obliged to allow, that towards the latter end of his reign he was too much inclined *to the left hand*, in order to reap forfeitures. If this had not been admitted by this principal historian, the known punishments of *Empson* and *Dudley* [n] for their illegal extortions, in order to fill the king's coffers, have put this blemish in his character past all cavil or dispute. I have before observed, that the statute of *Alienations* (as it is styled by Lord Bolingbroke and others, with such profusion of commendations) was by no means so extensive in its consequences as they have apprehended, nor could possibly have been so understood, if they had read that law with any degree of attention. Henry had, however, the merit, either from reasons of policy, or perhaps more humane motives, to render the lower class of people less dependent upon the powerful; of which a statute in the 11th year of his reign, entituled, *A mean to help and speed poor persons in their suits*, and commonly known by the name of the

[n] Henry the Seventh at first compounded for small penalties on penal prosecutions; but, growing more avaricious, he appointed Empson and Dudley to be masters and surveyors of them. Grafton, p. 57. Sir Thomas Moore, in his collection of epigrams, glances at this avarice in the predecessor of Henry the Eighth:

“Non jam divitias ullum est, *magnum esse solebat*,

“*Quæsitæ nullo, crimen, habere dolo;*”

and Lord Verulam, in the history of his reign, mentions the having seen an account of Empson's, with regard to forfeitures, postilled with the king's own hand, vol. iii. p. 100. Restitution was made by the executors of this king of several of these penalties. Grafton, p. 57. See also his will, lately published by that eminent antiquary Mr. Aftle.

Pauper act [o], is a very sufficient proof. He therefore deserves the honourable appellation of, *The poor man's king*; which
James

[o] The modern practice, under this law, is to make the plaintiff swear he is not worth 5*l.* besides his wearing apparel. The statute, however, of Henry the Seventh speaks of *poor persons* indefinitely: nor am I aware whence this practice hath been so settled, if it is not from the 2 Geo. II. cap. xxvii. § 8. which is confined, however, to the case of defendants prosecuted for offences against the customs.

Notwithstanding the humanity of this act of Henry the Seventh, by 23 Henry VIII. cap. xv. the pauper may be punished at the discretion of the judges, which accounts for what is sometimes heard of, though seldom practised, of a pauper plaintiff's being whipped. The Jewish law even forbids the countenancing a poor man in his cause, Exod. xxiii. 3. which is to be considered, however, as one of our statutes against maintenance. The acts which have introduced the necessity of stamps, in law proceedings, make the contest between rich and poor still more unequal than it was in the time of Henry the Seventh. By an ordinance of Charlemagne, the causes of the poor were even to have precedence of others, "ut primitus causæ orphanorum, viduarum, necnon & pauperum, causæ deliberentur." Leg. Longob. 58.

There is a sensible proposal in either the Gentleman's or London Magazine, for the month of January 1767, with regard to a *pauper's* being previously examined by the court, before he is permitted to sue. If such a petition had in this manner the sanction of the judge, the application would not afterwards be neglected, or supposed to have no foundation, as it too frequently is by those who can expect no emoluments for the undertaking such a cause. The proposer likewise hath suggested, that it would be right to allow a proper satisfaction to the advocate and attorney from the estate or property thus recovered, and so far to repeal the statutes against maintenance. In Scotland, he who petitions to be admitted as a pauper, produces a certificate of his poverty from the minister and church-wardens. His cause is then referred to a committee of lawyers appointed by the faculty of advocates, and if they report that he hath a probable cause of suit, he is admitted as a pauper. In case of success, and upon his cause appearing to be well founded, the court awards fees to his counsel, to be paid by the losing party.

James the First says his grandfather had obtained [p], a title which should last to the remotest ages, when his elegant and expensive monument in Westminster-abbey is not to be found in its place.

This protection of the inferior classes of his subjects produced, as a natural consequence, a greater freedom and independency in

party. “ In ogni senato vi farano i procuratori de *poveri*, l’incumbenza de quali fara parimente di patrocinar *gratis* per li medesimi, &c. Ordinances of the K. of Sardinia, c. xviii. Torino, 1723, Folio.

Sir Thomas Smith observes, that the court of *requests* even in his time entertained the petitions of all suitors to the crown without fee or expence, and that it was also called the *poor man’s court*, or *court of conscience*. Commonwealth of England, p. 116.

Ουκ εστιν ἄδεν κρείσσον, ἢ νομοὶ πολλοὶ
Καλῶς τιθεῖσις, ὅ, τε γὰρ ἀσθενέστερον,
Ὁ πλάστιγς τε τὴν δέκην ἰσὴν ἔχει.
Νικᾷ δ’ ὁ μείων τὸν μίγαν, δίκαι’ ἔχων,

Stobæus, p. 171. citing Euripides in Supplicibus, Parisiis, 1623, 4to.

These verses cited from Stobæus run thus in the common editions of Euripides :

Γεγραμμένων δὲ τῶν νομῶν, ὅ, τ’ ἀστονῆς
Ὁ πλάστιγς τε τὴν δίκην ἰσὴν ἔχει.
Ἔστιν δ’ ἐνίστην τοῖσιν ἀσθενέστεροις
Τὸν εὐτυχῆσαι ταυθ’, ὅταν κλυὴ κακῶς.
Νικᾷ δ’ ὁ μείων τὸν μέγαν, δίκαι’ ἔχων.

Εὐριπίδης Ἰκετιδῆς, ver. 433, & seq.

[p] Βασιλικὸν δῶρον, cap. xii.

“ Then Henry call’d a parliament againe,
“ (For subsidies he did remunerate
“ With lawes) and such were framed in his reigne
“ As with th’ old heroes shall him celebrate,
“ Lycurgus would be proud, if hither sent
“ To be the clerk of Henry’s parliament.”

Aleyn’s Henry VII.

the lower house of parliament [7]. Sir Thomas Moore opposed a subsidy, with success, in the last year of this king's reign; which is, perhaps, the first instance of opposition to a measure of the crown by a member of the house of commons.

[7] Sir Thomas Moore, in the same epigram before cited, alludes to this encouragement of the lower class of people, in opposition to the nobility,

"Despectusque diu magnatum nobilis ordo"

"Obtinuit primo pristina jura die,"

viz. on the accession of Henry the Eighth.

STATUTES

STATUTES MADE AT WESTMINSTER,

3 Hen. VIII. Cap. xi. A. D. 1511.

THERE is in the 33d vol. of Mr. Petyt's collection of Mss. a complete draught of an act, in the ninth year of Henry the Fifth, in which there are the following regulations with regard to the practice of Physick :

No one shall use the myserie of Fysyk unless he hath studied it in some university, and is at least a Batchelor in that science.

The sheriff is to inquire whether any one practises in his county contrary to this regulation; and if any one so practises, he is to forfeit 40 l. and be imprisoned.

The same penalty with regard to a woman who shall practise physick.

It is ordered in parliament, on this Petition, "that the Lords of the privy council shall make what regulations they shall think proper [r]."

The 11th chapter of the statutes of this session opens with a remarkable preamble in favour of the regular physicians and surgeons: "For as much as the science and cunning of physick and surgery is daily within this realm exercised by a great multitude of ignorant persons, of whom the greater part have no insight in the same, nor in any other kind of learning; some also *can* [s] no letters on the book, so far forth, that common artificers, as smiths, and weavers, and women, boldly and accustomedly, take upon them great cures, in

[r] Vol. xxx. p. 148 & seq.

[s] This perhaps should be *con*, though *can* is still used in this sense in the Northern parts of England.

"which

“ which they partly use sorcery and witchcraft, partly apply
 “ such medicines to the disease as be very noxious, and nothing
 “ meet, to the high displeasure of God, great infamy to the
 “ *faculty*, and the grievous damage and destruction of diverse of
 “ the king’s people.”

From this preamble it should seem, that physick was more liberally professed in England at this time, than perhaps in any other part of *Europe* [t]; and I should conjecture, that this preamble was drawn by the famous *Linacre*, as we find by 14 Hen. VIII. cap. v. that his name is the second mentioned in the first charter to the college of physicians, before *Ferdinandus de Viçtoría* [u].

There

[t] There was a distinction between the doctor of physic, and the apothecary, even so early as the time of Edward the Third.

“ Full redy had his ’pothecaries

“ To send him druggis, and ’lectuaries,

“ For each of them made to’ther for to winne,

“ Their friendship n’as not new now to beginne.”

Chaucer, in his Character of the Dr. of Phisick.

Chaucer’s physician also understands Hippocrates, Dioscorides, and Galen, as well as the Arabic writers on medicine. See his character of the Doctor of Phisike: he seems, however, to have entertained no great opinion of the physicians of his time:

“ And certainly where nature woll not wurch,

“ Farewell phisike, go bere the corse to chirch.”

Knight’s Tale.

[u] See a story mentioned in Rabelais with regard to *Linacre*. Rabelais, vol. ii. p. 173. He was tutor to Prince Arthur, and dedicated to him the version of Proclus. Jortin’s Life of Erasmus, vol. i. p. 9.

It appears by many letters of the kings of England to the popes, that their physicians were frequently ecclesiasticks, on whom the pontif is intreated to bestow preferment. [Rymer.] In the fourteenth year of Henry the Sixth, Thomas Franc, maître en medecine, et natif de Grece, applies for the king’s letters of denization, and it should seem from part of the petition, that he had gained very considerably by his practice in this country,

There are among the laws of Bearn (in Du Moulin's Collection of the customs of the different provinces of France) some seemingly wise regulations with regard to the improvement of medicine, which are perhaps of nearly the same antiquity with the present statute; and by the laws of *Provence* the acting as both physician and apothecary is forbidden, under no less penalty than banishment. "*Los medecin no deben haber part en los droguas deus ipotecaires, sans pena de perdere talas droguas, et estar forabanditz deu pais* [w]."

By an ancient ordinance of the *Wifigoths* (whilst in *Spain* [x]) a physician is not permitted to prescribe to a criminal, but in presence of the gaoler; the reason of which very singular law I take to be, that it was apprehended the prisoner might be supplied with drugs to destroy himself, and so avoid a public execution. By a law in the *Fuero Real de Espana*, no physician, or surgeon, is to bleed a man's wife but in the presence of her husband; which, without citing the *Fuero Real*, sufficiently appears to be a *Spanish* regulation.

Lord Chief Justice Hale says, that this statute of Henry the Eighth is a good caution to empiricks, who are certainly subject

country, which occasioned his having thoughts of realizing. Rymer, vol. v. part i. p. 33. In the 32d year of the same reign, when Henry the Sixth ceased to be king, from his infirmities, a licence is granted to certain medici & chirurgici to prescribe for his majesty's recovery, "*electuaria, potiones, aquas, sirupos, confectiones, laxativas medicinas*" "*in quacunque forma nobis gratiore, clysteria, suppositoria**, *caputpurgia*" "*gargarismata, balnea, vel universalia vel particularia epithemata, fomentationes, embrocationes, capitis rasuram, unctiones, emplastra, &c.*" Rymer, vol. v. part ii. p. lv. It should seem, from this very particular enumeration of the medicines which might be used, that it was not lawful for any thing to be administered to the king when sick, unless with such express authority derived from a formal instrument, which passed the privy seal.

[w] Du Moulin, vol. ii. p. 1143.

[x] *Fuer. Jusg.* l. xi. p. 433.

* I conceive this term to signify the glasses used for cupping.

to the penalties, if they transgress it; but combats much an opinion, which it seems prevailed in his time, that, if the quack's patient died through his ignorance, he might be indicted for murder [y].

Not only physicians are intended by this law to be put upon the liberal footing, which that most learned and useful profession merits from the public, but surgeons also, who receive a further encouragement from a statute of the fifth of Henry the Eighth, which exempts them from an attendance upon juries [z]. A ridicule has been thrown upon surgeons, from their

[y] Vol. ii. p. 240.

[z] It may, perhaps, be thought singular to suppose, that this exemption from serving on juries is the foundation of the vulgar error, that a surgeon, or butcher * (from the barbarity of their business) may be challenged as jurors. It is difficult to account for many of the prevailing vulgar errors with regard to what is supposed to be law. Such are, that the body of a debtor may be taken in execution after his death; which, however, was practised in Prussia before this present king abolished it by the *Code Fréderique*. Other vulgar errors are, that the old statutes have prohibited the planting of vineyards, or the use of sawing-mills; which last notion I should conceive to have been occasioned by 5 and 6 Edw. VI. cap. xxii. forbidding what are called *gig-mills*, as they were supposed to be prejudicial to the woollen manufacture. There is likewise an act of 23 Eliz. cap. v. which prohibits any *iron-mills*, within two and twenty miles of London, to prevent the increasing dearth of wood for fuel. As for sawing-mills, I cannot find any statute which relates to them; they are, however, established in Scotland, to the very great advantage both of the proprietors and the country.

It is supposed likewise to be penal to open a coal-mine, or to kill a crow, within five miles of London; as also to shoot with a wind-gun, or to carry a dark-lantern. The first of these I take to arise from a statute of Henry the Seventh, prohibiting the use of a cross-bow; and the other from *Guy Fawkes's dark-lantern* in the powder-plot. To these vulgar errors may be added the supposing that the king signs the

* Joseph Scaliger informs us that a duke of Brunswic, in his time, took a particular pleasure in knocking down an ox. Scaligerana, p. 37.

their having been incorporated, formerly, with barbers, from which union they have but within these few years separated themselves. The ridicule, however, arises from the change in the barber's situation, and not that of the surgeon [a]: before

death-warrant (as it is called) for the execution of a criminal; as also, that there is a statute which obliges the owners of asses to crop their ears, lest the length of them should frighten the horses which they meet on the road.

To these vulgar errors may be perhaps added the notion, that a woman's marrying a man under the gallows will save him from the execution. This probably arose from a wife having brought an appeal against the murderer of her husband; who afterwards, repenting the prosecution of her lover, not only forgave the offence, but was willing to marry the appellee. It is also a very prevailing error, that those who are born at sea belong to Stepney parish. I may likewise add to these, that any one may be *put into the Crown-office*, for no cause whatsoever, or the most trifling injury. An ingenious correspondent, to whom I have not only this obligation, suggests two additional vulgar errors, "When a man designs to marry a woman who is in debt, if he take her from the hands of the priest cloathed only in her shift, it is supposed that he will not be liable to her engagements." The second is, "that there was no land-tax before the reign of William the Third."

[a] It appears by Joinville's Life of St. Lewis, that barbers in other countries were anciently the surgeons who attended armies during a campaign. Speaking of the sickness amongst the Christian army in Egypt, he says, "*les barbiers oterent la char morte*," p. 65. And much later, Verville (in his *Moyen de parvenir*) "*Elle m'a contée que vous disiez au barbier, qui vous pançoit, &c.*" It is believed, that there is not, by the laws of any other country, so early an attention to the promotion of anatomical knowledge as by the thirty-first of Henry the Eighth, which empowers the united companies of barbers and surgeons to dissect yearly four of the bodies of condemned malefactors executed at Tyburn.

A bill was preferred in the House of Lords (the thirty-ninth year of Queen Elizabeth), for the better furnishing lawful chirurgeons in the land and sea services. Journals, January 17, 1597. The regulations of this bill might perhaps not be without its use at present, when our armies and fleets are so increased.

the invention of perukes, barbers were not employed often in the low office of shaving [b], and as for the making of wigs, it is a branch of trade which hath no sort of connection with chirurgery.

[b] It should seem from ancient portraits, that the beard was suffered either to grow to its full length, or else to have been clipped in part only. There were anciently the same disputes between the French barbers and surgeons, in which the physicians interfered in order to support the barbers against the regular surgeons, who were supposed to inroach too nearly on the province of the physicians. See Pasquier's *Recherches de la France*, p. 866, et seq. It appears, in part of this controversy, that the barbers were very desirous of hearing lectures in anatomy. *Glorieux comme un barbier*, is a French saying, and Du Chat imputes the origin of it from their very near contact of the faces of kings and great men. Ducatiana, vol. ii. p. 458. It appears by an instrument in Rymer, entituled, "*Pro barbitonsore Regis*," that the king's palace, in the time of Henry the Sixth, was surrounded with little shops (opillæ) which were to be entirely under the direction and controul of this *great officer*, together with the clerk of the Ewry. As there were then no carriages, and the streets very dirty, it is not improbable that those who went to court were shaved, as likewise dressed, in these stalls or shops, before they appeared in the royal presence. Rymer, vol. v. part i. p. 180. A considerable fee is also given to this barber for shaving every knight of the bath on his creation, as well as forty shillings from every Baron, 100 from every earl, and 10*l.* from every duke, on the like occasion.

STATUTES MADE AT LONDON^[c],

21 Hen. VIII. A. D. 1529.

THE title of the 7th chapter of the statutes of this session is as follows: “*Servants embezzelling their masters goods, to the value of forty shillings, shall be punished as felons* ^[d]”; and the preamble sets forth, that it was *doubtful at common law* whether such embezzelling was felony, or not. This seems to me to be one of those doubts recited by the preambles of statutes, which have much enervated the principles of the common law, and the bad consequences of which I have already observed upon. It is agreed by all the writers on the crown-law, that if a butler steals his master’s plate, or a shepherd his master’s sheep, it is felony. The reason why this should be thus considered is as clear, from his having no sort of property in the thing stolen; a servant therefore robbing under such circumstances is within the general rule of all larcenies including trespass, and the word *cepit* inserted in indictments for this offence is fully satisfied ^[e].

What,

[c] This parliament was afterwards adjourned to Westminster.

[d] By 27 Hen. VIII. ch. xvii. the benefit of clergy is taken away from such offenders. This statute is published at length by Raftall; and the title of it is, “An act concerning such as be put in trust by their masters, and afterwards do rob them.”

[e] The civilians add to our common definition of larceny, viz. *the fraudulent taking the goods of another against his consent*, that they must be also stolen *cum studio lucri*; and hence they excuse the common instance

What, therefore, the writers upon the crown-law say with regard to a carrier's stealing goods, whilst they are under his charge, seems to me (I speak with great deference to such authorities) not to be consistent with the principles which are above laid down: as the carrier hath no better property in such goods than the butler hath in his master's plate, or the shepherd in his master's sheep. The case which is generally cited, in support of this doctrine, is the thirteenth of Edward the Fourth [f]; which, though it is the foundation of what is conceived to be law with regard to this point, seems to be misunderstood. The case is a long one, and I shall state from it the material parts before the court, together with the final decision. "It was debated in the Star-chamber before the council, whether a person, having bargained with another to carry certain bales of goods to *Southampton*, who took and carried them to another place, broke open the bales, and converted them to his own use, was guilty of felony, or not? A variety of opinions upon this arise, and it is agreed, that the point should be argued before the judges in the Exchequer-chamber. Upon the same doubts (then again argued) the judges differ in opinion, though it should seem, from the short notes of what they said, that the majority at first thought it was *not* felony;" from which it hath been conceived, that the point was so determined. It appears, however, by the conclusion of the case, that the judges certified their opinion to the chancellor, *it was felony*.

of an hungry person's stealing meat. See Peckius ad Rem Nauticam, p. 215. Utrecht, 1697, 12^{mo}. In the Orphan of Chao (one of the plays inserted in Du Halde's History of China), a large Chinese, half famished, lies under a mulberry-tree, in hopes that some of the fruit will drop into his mouth, and will not pick it, dreading the imputation of larceny.

[f] Term Pasch. pl. 5.

It is plain, therefore, that this leading case hath been misunderstood, and the occasion of it I take to be this. Those judges, who are of opinion, that the criminal was not convicted of felony, say, he who steals goods (*qui lui sont bailes*) is not guilty of larceny; which position may be allowed, if the word (*baile*) is understood in its proper sense of lending upon pledges; as the bailee, or pawnee, in such a case, having a special property in the goods, cannot be indicted for stealing them. Another reason may be also given, why the pawnee under such circumstances should not be considered as a felon, which is, that the pawnee knows against whom he is to bring his civil action, if the goods are detained beyond the justifiable time. *Staunford*, in his Pleas of the Crown, puts many cases on this head, which relate to *bailment upon pledges*; and I am therefore confident, that all those decisions, which have been determined upon mature consideration, will, if properly attended to, relate to *supposed larcenies*, where the bailee hath a special property in the goods stolen. I submit this, however, with great deference; because it is a point of infinite consequence to the publick, as what are called *breaches of trust* do but too much increase, with the greater temptation that daily arises from the enlarged trade of this country, which necessarily requires a confidence in men who have had but mean educations, and have often thence contracted an illiberal disposition.

Whether I may be thought to have too presumptuously differed from the opinion of the writers on the crown-law, in certain parts of what I have here ventured to advance, or not, I should think that the doubt, which is recited in the preamble of this statute, could never have been that of a lawyer. For in what respect is a servant running away with a casket of jewels (which I have not lent to him upon pledges, or as a security) to be distinguished from the case of a butler, who steals his master's plate,

plate, which the writers upon the crown-law, and particularly Hawkins [g], allow to be felony, though he seems to doubt, whether the offence stated in this statute amounted to a felony by the common law? It is admitted, however, that greater accuracy cannot be expected, in a work of such an extent, than is generally to be found in his very valuable treatise on the Pleas of the Crown.

This chapter of the statute is followed by another, which orders restitution of the goods stolen, when the prosecution is by indictment, and not by appeal; which regulation hath in effect taken away the *appeal for larceny*, anciently so frequent. I should suppose, that both these laws were made, as Lord Verulam terms it, *on the spur of the occasion*, and that a servant had, at this time, run away with a casket of jewels, which happened to be of considerable value.

The civil law not only makes *a breach of trust* amount to larceny, but declares, “Si creditor pignore, sine is apud quem res est deposita, eam re utatur, sine is qui rem utendam accepit, in alium usum eam transferat, quam cujus gratia ei data est, furtum commississe videtur.” At the latter end of the session of parliament for the year 1765, a bill was also proposed, in the house of commons, to declare breaches of trust, accompanied with certain circumstances, to be felony.

By the *Swedish law*, if any thing is found, without proper notice, or advertisement to those who may be the owners, and the finder converts it to his own use, “in crimen furti incidit. Quin et domesticorum furta, gravius quam simplicia constitutionibus puniuntur [b].” Thus also Stiernhook, “Fur
“facile

[g] Hawkins, vol. i. p. 89.

Staunford, on the other hand, in his Treatise on the Pleas of the Crown, p. 25, states the following case from the Year Books: Si jeo baile un “bagge d’argent à mon servant à garder, et il fuast et allast de moy ove le bagge, est felonie.”

[b] Themis Romano-Suecica. Gryphiswaldiæ, 1729. Thus likewise by
the

"*facile invenit* (ut ædituus, calicem) *jocatur jus antiquum.*
 "Hoc enim titulo, fures deprehensi, se frequentissimè excusant:
 "itaque *inventa* publicari leges præcipiunt [i]."

the Piedmontese laws, "I ladri domestici si puniranno sempre con pena
 "maggiore di quella, che si e regolarmente destinata per gl'altri." Or-
 dinances of the King of Sardinia, p. 516. Torino, 1723, Folio.

[i] De Jure Sueonum Antiquo, p. 375.

STATUTES MADE AT WESTMINSTER,

23 Hen. VIII. Cap. i. A. D. 1531.

THIS may be looked upon as the first general law which takes away the benefit of clergy, as the twelfth of Henry the Seventh had only deprived those of this privilege who were convicted of petit treason, or by the most extensive construction, *murder* [k]. The criminals, who are to suffer capitally by this statute, are those convicted of murder, sacrilege, arson, robbery in or near about the highways, or in dwelling-houses, the owner, his wife, children, or servants, *being within, and put in fear*. From these two kinds of larceny thus specified, it is very clear, that the legislature meant to punish capitally only those larcenies, or robberies, which were attended not only with the loss of the person's money or goods, but likewise with circumstances of aggravation and violence. As our statute law at present hath taken benefit the of clergy from many other kinds of larceny, and hath been by many thought to have extended the severity of capital punishments for this offence too far, it may not be improper to take a summary view of the different acts of parliament, which will be found naturally to arise from the many and great improvements by commerce, from century to century.

[k] See the observations on that statute. The present law punishes *real clerks* by their being delivered to the ordinary, who is not to allow what is called *purgation*, but imprison them during their lives; which is believed to be the only instance of punishing by imprisonment for life, either by the common or statute law.

Before the reign of Edward the Third, it seems to be generally agreed we had no gold coin in England [1], and the silver likewise is believed not to have been in great profusion. Rents also were paid almost entirely in kind; and as there was scarcely any trade, the little money in circulation was chiefly in the coffers of the great barons, *centum servata clavibus*, which no one therefore could steal, or carry away. As for plate (the great object of temptation to a thief), there was still less to be found; and it appears, by the wills of some of the ancient kings of England, that they left legacies of this sort which a gentleman of a common fortune at present would not think worthy a legatee's acceptance. With regard to other kinds of furniture, it was clumsy and heavy, consequently less liable to be stolen or carried off; and as for linen, which is the most easily dis-

[1] The first mention of any gold coin in Rymer, as proceeding from an English mint, is in a proclamation of 18th year of Edward the Third. The pieces of money, which were by this authority to become current, are

“ Une monnoie d'or od deux leopertz,
 “ Une autre monnoie d'or od un leopert,
 “ Une autre monoi d'or od un heaume.”

Their weights are also subjoined. See Rymer, vol. ii. part iv. p. 158.

It hath lately been suggested to me, however, by a person of erudition, that there is proof of gold being coined *as money* so early as the reign of Henry the Third. These proofs are to be found in some additions, by the Society of Antiquaries, to Mr. Folke's Tables of the gold and silver coins of England, where a manuscript of the thirteenth century, in the Chamberlain's office at Guildhall, London, is cited, *de antiquis legibz*: “ Hoc anno (sc. 1257) creavit Rex monetam auream denar' ponder' duor' sterlingor' de auro purissimo, et voluit ut *ille aureus curreret* precio viginti st'lingor;” to which citation is added, “ the gold coin therein mentioned must have been received as money at the time of its coinage.” See also the Rev. Mr. Clarke's learned and ingenious dissertations on this subject, p. 373, et seq. 4^{to}. London, 1767. In the *Dialogus de Scaccario* likewise, the *Marca auri* is mentioned. L. ii. c. xxvi.

posed of by the pilferer, it is believed that little was worn at this time, as the mountaineers in Wales, who may be supposed to live at present as the English did centuries ago, still use nothing but flannel.

Trade, however, by this year of the reign of Henry the Eighth, had considerably increased, together with its natural concomitants, luxury and elegance. The house had now something to tempt the pilferer; and if it was, by its situation, at a distance from other habitations, gangs of thieves beset and rifled it [*m*], which seems to have been the occasion of the statute's requiring, that the owner or his family should *be put in fear*.

The next law that takes away the benefit of clergy from larceny is 5 and 6 Edw. VI. cap. ix. which extends the statute of Henry the Eighth to a robbery in a house, where the owner or any of his family happen to be, although they are *not put in fear*. This was probably occasioned by a house having been rifled whilst the owner and his family were asleep [*n*], and

[*m*] The first statute against *Egyptians* passed the year before, which recites them to go from place to place in great companies. It appears by Harrison's Description of Britaine, that they had invented a language peculiar to themselves, called *Pedlars French*, and that they were subdivided into fifty-two different classes of thieves; the names of which he enumerates, p. 107. He concludes his account by saying, "wherefore the "ende must needs be martialle lawe to be exercised upon them." Ibid. This very peculiar race of people are banished from almost every part of Europe; they are in French called *Bobémiens*, in Italian *Zingani*; their complexions seem to prove, however, that they come originally from Egypt, or some southern latitude.

Robberies had at this time increased so much in France, that Francis the First (contemporary with Henry the Eighth) issued an ordinance for punishing this crime by breaking on the wheel; by which it appears, that the sentence for this offence was, before, the same in the two countries.

[*n*] The Swedes say, that he, who steals in *the night*, breaks God Almighty's lock. Nugent's Vandalia, vol. i. p. 450.

confe-

consequently *not put in fear*, though it is a necessary circumstance by the statute of Henry the Eighth. The legislature having thus explained the twenty-third of Henry the Eighth, by the same act takes away likewise the benefit of clergy from a robbery in a booth, or tent in a fair. This protection to the property of a person, who kept a shop or booth in such a place, arose from fairs being much more considerable than they now are, and possibly not unlike those of Germany, in which very large transactions are carried on: whereas at present the well-supplied shops in every town and village almost, as well as licensed hawkers, do not make it necessary for the inhabitants of the county to wait for a particular anniversary, to supply the wants of the whole year. It is so requisite, that a Laplander should purchase goods at the stated fairs, that the Swedish government raises a considerable revenue, by granting licences to resort to them, without which it is highly penal [o].

The next statute that relates to robberies in dwelling-houses [p], is the 39 Eliz. cap. xv. which recites that the poorer sort of people

[o] Outhier's Voyage au Nord, p. 149. Paris, 1744, 4^{to}.

[p] It was allowed by the *twelve tables* to kill a burglar. QVEI. NOX.

FORTOM. FAXSIT. SEI. IM. ALIQVIPS. OCCISIT. IOVRE. CAESOS. ESTOD. SEI. LOVCI. FORTOM. FAXSIT. TELOQ. SE. PRAEHENDIER. PROHIBESIT. SEI. IM. ALIQVIPS. OCCISIT. IOVRE. CAESOS. ESTOD. AST. SEI. LOVCI. FORTOM. FAXSIT. NEQVE. TELO. SE. PRAEHENDIER. PROHIBESIT. SEI. LEBIR. SIET, PRAETOR.. IM. VERBERARIER. IHVBETOD. EIQVE. QVOI. FORTOM. FAXSIT. ADDECITO. SEI. SERVOS. SIET. VIRGEIS. CAESOS. EX. SAXO, DEICITOR. SEI. IMPOBES. SIET. PRAETORIS. ARBITRATVV. VERBERATOS. NOXSIAM, SARCITO. This law is remarkable not only for the matter, but for the language and orthography of it. It seems, from the spelling, that the Romans generally pronounced their *u* as the Grecians did their *u*, and as the French now pronounce those vowels when joined together: at least this observation holds true in those syllables of words which are not final, as in *joure*, instead of *jure*; and the Roman name of Lucullus, which is in Greek Λυκουλλος. In the ends of words, *o* is used instead of the more moder.

people were obliged to leave their houses, during divine service, without any one in them; as likewise when they were employed in country business: it therefore enacts, that, if any person shall steal goods from any dwelling-house (*though no one is within*) which exceed the value of five shillings, he shall be excluded from the benefit of clergy.

By this time tenants had procured from their landlords leases for terms of years, whilst, having a more permanent interest in their farms, they could afford to improve them, and reaped the honest fruits of their industry. As their rents were now paid in money, they must at times have had considerable sums in their houses, and perhaps a silver spoon [q], or linen, to tempt the

modern spelling with *u*, as in *casos*, instead of *casus*, which again agrees with the Greek termination of Λουκουλλος, instead of Λουκουλλυς. The Asiatics likewise pronounce the *u* in the same manner; thus *Jounious* is the month of June, and the name Dionysius becomes *Dionousious*. See D. Herbelot, in articulis.

If I may be pardoned a still further digression on this occasion, I should suppose likewise, that the Romans pronounced with the guttural letters, as all nations of the globe continue to do, except the English, French, and Italians*.

Ovid informs us, he was so versed in the language of *Tomos*, that he spoke the different dialects of it:

“Nam didici Geticè, Sarmaticèque loqui.”

He also mentions, that he not only made poems in this language, but recited them with great applause to these barbarians.

From this I infer, that the Romans pronounced gutturally; and let any Englishman, who doubts of this, try to recite some verses of a Welsh bard, he would certainly not meet with applause, but ridicule, from his audience; nay, he would find it to be absolutely impracticable. A Highlander or Negro, however, learns to pronounce the Welsh language very soon, because they use gutturals in their own.

[q] Fynes Morryson observes, that, at the latter end of Queen Elizabeth's

* The Tuscans, however, still pronounce gutturally.

the thief, who, watching the opportunity of every one being absent, not only plundered the house with ease, but evaded the two former statutes, both of which required the owner, or some of his family, *to be in the house, at the time the robbery was committed.*

The legislature having thus endeavoured to secure the property of the farmer, in the third year of William and Mary [r], when trade had infinitely increased, shewed the same protection to merchants, another most useful class of men to society, by enacting, that “if any one shall steal goods from any shop, or “warehouse, adjoining to a dwelling-house, to the value of five “shillings, he shall not be entitled to his clergy, *although no “person shall happen to be within.*” Eight years after this, the eleventh of William the Third, commonly called *the shop-lifting act*, takes away clergy from him who shall privately steal goods, to the value of five shillings, from any *shop, warehouse, coach-house, or stable.* This last statute, besides including *coach-houses and stables*, does not make it necessary, that the shop or warehouse shall be adjoining to the dwelling-house, which is required by the 3d of William and Mary. I the rather take notice of this distinction between the two laws, as Mr. Justice Foster hath reported [s] a decision at the Old Bailey in July 1751, that this statute does not extend to any warehouse, which is a mere repository for goods, but only where merchants and traders deal with, and sell to, their customers. It should seem, however, that these distant warehouses were those which were particularly intended to be protected by this statute, as the 3 Will. III.

reign, there were few, amongst the better sort of English gentry and merchants, who had not cupboards of silver plate, to the value of £.200.
Part iii. p. 178.

[r] Cap. ix.

[s] Reports, p. 78.

cap.

cap. ix. expressly extended to the shop or ware-houses *adjoining to a dwelling-house*; and the more distant the warehouse, the more probable it is that it should be broken open.

Lastly, the 12 Ann. cap. i. takes the benefit of clergy from him who shall steal goods to the value of forty-shillings from any *out-house*.

I have endeavoured, by this state of the different statutes, which relate to the robbing of the dwelling-house [t], or building in some measure connected with it [u], to shew the one naturally to arise out of the other, from the alteration of circumstances from time to time, and chiefly from increase of trade; as also to justify the statutes from being considered as too severe. What hath besides contributed to the opinion, which many have formed, that our laws, with relation to the punishment of this offence, are too bloody, is perhaps the comparison of the English statutes with those of other nations; but till a country can be found, which contains equal property

[t] As for other larcenies, it is well known, that they are seldom punished with death. It is rather singular, that the receiving of goods, knowing them to be stolen, should not have been made a felony till the fifth year of Queen Anne, as *Phocylides* had declared such an offender to be equally a thief:

Ἀμφοτεροὶ κλέπτες, καὶ ὁ δεξαμενός, καὶ ὁ κλεψίας.

Νῆθετικὸν Ποίημα. ver. 128.

The Ægyptians on the contrary instituted a public magistrate, who exactly answered to the practice of Jonathan Wild. Every thing stolen was brought to this officer; and he, whose property it was, recovered it by paying a small sum, which was supposed to be a punishment for his negligence in losing it. See Diodorus Siculus, l. i. c. 8. Diodorus mentions this as νόμος ἰδιότητος, which it most certainly is.

[u] A statute of the late king hath indeed gone much further, by making it felony to steal black lead from the mine.

and riches, the conclusion cannot be a just one [w]. I allow that, by the laws of most parts of the ancient world, this offence was not a capital one [x]; and Plato observes, from a passage in the *Odyssæy*, that, in the time of Homer, it was not considered as a blemish, but rather honour to a man's character.

It is well known, that Lycurgus is said to have gone still further, and to have even promoted it at Sparta by his laws. If this really was amongst his institutions, it seems to have been one of the most extraordinary reveries of this most paradoxical legislator. I should, however, suppose that we have a very

[w] I have not an opportunity of being informed accurately what kind of thefts are punished capitally in Holland.

[x] Instances, however, are not wanting of its being so in the middle ages. Thus Hector Boethius informs us, that, by the laws of Kenneth, thieves were to be punished with death; by those of Athelstan also, a freeman was to be thrown from a cliff, and a slave to be stoned. It should seem likewise, that theft was a capital offence by the old Welsh laws, as a particular rock is shewn in Merionethshire *, between Dolgelly and Tal-y-llyn, whence the criminal (according to the laws of Athelstan) used to be precipitated: there is also a traditional story, that a prisoner desiring the executioner to shake hands with him before he died, involved him likewise in the punishment. Herald Gille, about the year 1134, used also to precipitate criminals near the Sarpes Cataract, in that province of Norway, which is called Christiania. Busching's *Geogr.* vol. i. p. 192. By the laws of Oleron, "*Latro de furto convictus tondeatur ad modum campionis, et pix bulliens super caput ejus effundatur, & pluma super caput ejus ad cognoscendum eum, et in prima terra qua naves applicuerint, projiciatur.*" Rymer, vol. i. part i. p. 21. So that the New Englanders have not the merit even of being the inventors of this horrid punishment.

Fuller (in his *Worthies*) gives an account of an ordinance of Edward the First, with regard to the stealing lead or silver ore from the Derbyshire mines. For the third offence, a knife was to be stuck through the hand of the criminal fixed on a table, in which agony and attitude he was to continue, till he had freed himself by cutting off his hand.

* This cliff is called by the Welsh *Craig-y-llam*, which is said to signify *the rock of the leap*.

inaccurate account of the Spartan customs or manners [y], as their institutions were of a most forbidding nature to a stranger, who would not therefore live with them; and as the Spartans themselves were, by their laws, obliged to be illiterate, we cannot receive any information upon this head from a Spartan writer. I should therefore suppose that this approbation of larceny hath been misunderstood, from an encouragement given by their legislator to make depredations upon the neighbouring states [z], which tended to keep up their perpetual wars, and martial disposition: as for a theft at home between Spartan and Spartan, Lycurgus had taken care that there should be nothing to steal.

[y] Xenophon indeed hath written an express treatise, which is entitled *Λακεδαιμονίων πολιτεία*; but the distance of time between him and Lycurgus must have made the traditions and account of the Spartan laws very little to be depended upon, as Lycurgus is said by Plutarch to have lived in the first Olympiad, and Xenophon is supposed to have flourished in the 94th.

Another reason that invalidates the testimony of Xenophon is, that his treatise upon the Lacedæmonian institutions is followed by another on those of the Athenians, which (with the pique of a banished citizen) he endeavours to represent as inferior. Allowing however what he says with regard to the permission of larceny by Lycurgus, he confines it to theft of victuals, and that by an hungry man: *ὡς δὲ μηδὲν ἄλλο τι ἀλλὰ ἀνὰ τὴν ἀνάγκην, ἀπὸ τῶν ἀλλοτρίων λαμβάνειν τὸν ἀνὰ δυνάμειν, κλεπτέον δ' ἐφημεν ἐστὶν αἱ, τῶν λιμῶν ἐπιταγῆς.* Ed. Hen. Steph. p. 394. Plutarch likewise agrees in confining this permission to the stealing victuals *κλεπτέον δὲ καὶ τῶν σιτίων ὅτι ἀνδυνώσαι, μανθάνουσι, εὐφρυνεῖται τοῖς καθεύδουσιν, ἢ ῥαθυμῶς φυλάσσονται.* Francofurti, 1620, vol. i. p. 50. Probably none of these strange laws were ever carried into execution, or attended to for any time, as was probably the case of the Sabbatical year amongst the Jews. See the English Translation of Michaelis's Diff. on the Sabbatical year.

[z] I have before observed, on the fourth of Henry the Fourth, that the civilized Athenians were required, by one of their laws, to make depredations twice a year upon the people of Megara.

The

The Romans punished this offence in their slaves often with death: the senatorial order, however, were even exempted from any prosecution for this crime, according to Dio Cassius: Ὑποδε τὰς αὐτὰς ἡμέρας δόγμα ἐγένετο, μηδενα τῶν ἐς τὴν γερουσίαν τελωνίων ἐπὶ ληστία κρινέσθαι· καὶ ὕστερ οἱ τε τοῖς ἐν τοιαύτῃ τινι αὐταῖς οὐδὲς ἀφαιθῆσαν [a].

None

[a] Dio Cass. l. xlix. p. 477. edit. Hen. Steph. Thus also, Lord Clarendon informs us, that the House of Lords, in the time of Charles the Second, insisted upon their privileges being saved in a bill to punish *wood-stealers*.

It hath been advanced by very great authority in the House of Peers, that the Journals had been examined in vain, with regard to what is contained in the passage I have alluded to from Lord Clarendon. I make no doubt after this, that no traces of any thing, relative to this claim of privilege, are to be found in the Journals; but it cannot well be supposed, that Lord Clarendon, a peer, chancellor, and speaker of the House, could have been mistaken in what he asserts, especially as a statute passed in the fifteenth of Charles the Second, for the punishment of *wood-stealers*. I should imagine, that the lords, who insisted upon this exemption, were afterwards ashamed of the point; and there being no division probably, or question put, it might occasion no entry being made with regard to it in the Journals. But perhaps it will be most satisfactory here to subjoin the whole passage alluded to, whence the reader may form his own conclusions:

“ When the House of Commons sent up a bill for the suppression, or
 “ reformation of many irregularities, and misdemeanours, which had
 “ grown up in the late times of disorder and confusion, as conventicles
 “ and other riotous assemblies, wherein there was a necessity of some
 “ clauses of power to inferior officers; whereby they were qualified to
 “ discover those transactions, which would otherwise be concealed; the
 “ lords would be sure always to insert some proviso to save their privi-
 “ leges, even in acts which provided for the punishment of such crimes,
 “ as no person of quality could be supposed to be guilty of; as, *stealing*
 “ of *wood*, and such vile trespasses, which took up much time in de-
 “ bate, incensed the House of Commons, and produced many and
 “ froward debates, in which the king thought the peers in the wrong.”

R r r 2

Lord.

None of these instances, however prove, that thefts, attended with aggravating circumstances, might not have been punished capitally; though, as with us, what goes by the general name of larceny, might have been treated with greater indulgence to human infirmities, or even perhaps somewhat encouraged by a whimsical legislator. Nothing can exceed the absurdity of many of Lycurgus's laws; except perhaps the continuing to speak of them with commendation.

I cannot find that any nation ever attempted to adopt the Spartan manners and institutions, except the Lucani, who inhabited the western side of that part of Italy, which was anciently styled *Magna Græca*: "Namque Lucani iisdem legibus liberos suos quibus et Spartani instituere soliti erant; quippe ab initio puerbertatis in sylvis inter pastores habebantur, sine ministerio servili, sine veste quam induerent, vel cui incubarent, ut à primis annis duritiæ parcimoniaeque sine ullo urbis usu, assuescerent [b]."

Lord Clarendon's Life, p. 384. Folio Ed. by the lately-printed Journals of the House of Lords it appears, that on the 11th of May, 1662, the lords passed the bill *without any amendment*. This proves demonstration, that the objections were given up as being too ridiculous to be insisted upon; for it is impossible, that Lord Clarendon could have taken notice of the disputes in the house on this absurd point of privilege, if no such altercation had really passed.

[b] Justin. l. xxiii. c. i.

STATUTES

STATUTES MADE AT WESTMINSTER.

27 Hen. VIII. Cap. IV. A. D. 1535.

THE 4th Chapter of these statutes regulates the proceedings in piracy, or other capital offences committed on the high seas, which the preamble recites to have frequently been committed with impunity, because the trial before the admiral, or his commissary, was according to the rules of the civil law, which requires either confession of the criminal, or *proof by indifferent witnesses*. The statute after this recital directs, that such offences shall for the future be tried by the king's commission, in any county, in like form and manner, as if the crime had been committed on shore.

I should conceive that this statute was drawn by some civilian, as it contains a most strong and undeserved reflection on the common law, by insinuating "*that indifferent witnesses were not required at the trial by the common law, as they are by the civil law.*" It is true, that more exceptions to the testimony of witnesses are allowed by the Roman law [c], than by that of England;

[c] From these very nice and minute distinctions by the writers on the Roman law, Fuller asserts, that, in his time, the library of a civilian would cost £.2000, whilst that of a common lawyer might be purchased for forty. Worthies of England, p. 21. Before the publication of Viner's abridgement, the late Mr. Osborn, bookseller, undertook to furnish a complete collection of law and equity for £. 120. Our statutes, however, disqualify one kind of witness, which was allowed by the Roman law, as it appears by Cicero's letters, that those who were interested in the event of the will, expected to attest it. See l. xii. ep. 18. and l. xiv. ep. 3.

By the old French law, the objections to the competency of witnesses are still more numerous than by that of the Romans. Thus Beaumanoir,

in

England; but they seem to be unnecessarily multiplied, and of too refined a nature: our law does not permit a criminal to

in his Coutumes de Beauvoisis, "*Batars et serfs doivent estre deboute de leur tesmoignage, se le querele n'est contre serf ou contre batar; mesiau ne doit pas estre oi en tesmoignage, car coutume s'accorde que ils soient deboute de la conversation des autres gens; chaux qui sont a men pain, et a men pot, ou en men mainburnie, ne doivent pas estre oi en tesmoignage pour moi.*" As both the language and orthography of the above citation are very ancient, I shall translate some of the more unusual terms. *Mesiau* signifies a leper; it is sometimes in this author written *mesie* and *mezle*, which agrees with the sense of the word *measly* when applied to swine's flesh: such a difference in the spelling of a word will not surprize any one, who hath happened to read many old authors in any of the modern languages. *Chaux qui sont a men pain, et a men pot, ou en men mainburnie**, signifies *those who eat my bread, or partake of my pot, or are under my guardianship or government.*

This treatise of Beaumanoir † is so complete, and throws so much light upon our ancient common law, that it cannot be too much recommended to the perusal of the English antiquary, historian, or lawyer. He kept the courts of the Comte de Clermont, and gives an account of the customary laws of Beauvoisis (which is a district about forty miles to the northward of Paris) as they prevailed in the year 1283. He is consequently a more ancient author than Littleton, and, to speak with all due reverence to this *father of our law*, perhaps a better writer. It need hardly be said, that the customs of the two countries were at this time very similar, especially of the more *northern* parts of France; if it wanted other proof, the commentators on the oldest French law books cite Littleton as illustrating their customs.

* This word hath the same signification with *mundoburdum*, as used by Baluzius; *Cunninge's mund-byrd* (in the Saxon laws) is likewise translated, *Regis Patrocinium*.

† Beaumanoir's work was first printed at Bourges in 1690, with a short commentary by Gaspard Thaumas de la Thaumasiere, who at the same time published *Les Assises de Jerusalem*, which contains a most complete code of regulations for the government of the Christians, whilst in possession of that part of Asia, and may, therefore, be supposed to participate of the laws of most parts of Europe.

Lord Verulam left a worthy work unfinished concerning the Holy War. Fuller's *Holy War*, p. 240. The loss of this is to be much regretted, as the laws made by the Christians in Asia must have been necessarily considered as an object worthy his attention.

be convicted, but upon the most satisfactory evidence, and such proof cannot be expected from what this preamble, by implication, styles *witnesses swearing under improper bias*.

There is a parenthesis of some ambiguity likewise thrown into this preamble, which relates to the confession of the criminal required by the civil law ("*which they will never do without torture or pains*"). I will not dwell, however, upon the true meaning or construction of this recital, but shall only observe, that the practice of torturing criminals is not spoken of with any great abhorrence by the legislature; nay, seems to be recited as allowed to have been practised in this country, in all offences tried before the admiral. I have, in my observations on the statute of Westminster the first, endeavoured to prove, that torture, though not frequently used, was not absolutely unknown in England, since which some additional proofs have occurred. Oldmixon in his history [d] asserts, that a confession was thus extorted from one Simpson in 1558 [e]. Sir *Walter Raleigh* also at

Mr. Houard, also, a learned advocate of the parliament of Dieppe in Normandy, hath lately translated Littleton into modern French, to which he hath subjoined an account of Glanvil, Fleta, and some other of the most ancient writers on our law.

Amongst an infinite number of proofs, with regard to the agreement of the laws of the two countries, there cannot be a more irrefragable one, than what is called the *Curtesy of England*, by which the husband (under certain circumstances) claims the land that belonged to his wife, after her death. This is supposed from the name to be peculiar to England, whereas the word *curtesy* is clearly derived from the French word *courtoisie*, and it is called *curtesy of England*, to distinguish it from a very similar right by the Norman law.

[d] P. 284.

[e] We find by Cornificius's *Rhetorica* (sometimes published together with the works of Cicero) that it was an usual topic of dispute, what kind of credit was to be given to evidence thus procured, "*A questio-
nibus dicemus, cum demonstrabimus majores nostros veri inveniendi causâ
tormentis*"

at his trial mentions, that *Kemish* was threatened with the rack, and that the keeper of this horrid instrument was sent for, which seems to prove, beyond all doubt, that this mode of punishment had been occasionally used, otherwise there would not have been a regular officer who had the custody of it [f].

Torture
*"tormentis et cruciatibus quæri voluisse, et summo dolore cogi, ut, quicquid
 "sciunt, dicant;"* the same appears, likewise, by the 5th book of Quin-
 tilian. Bishop Laud told Felton, that, if he would not confess, he must
 go to the rack. Felton on this said, "that he might then perhaps accuse
 "the bishop himself whilst under torture." Whitelock's *Labours Re-
 membered*, in the Annals of his Life. It is difficult to read the following
 ordinance of the king of Sardinia without shuddering: Avertira 'l Giudice
 "che 'l segretario scriva tutto quello che 'l reo dira in tempo del tor-
 "mento, denotando distintamente i cambiamenti ed i moti che dal medesimo
 "si faranno." Laws of the king of Sardinia, p. 452. Turin, 1723.
 Folio.

[f] Lord Coke, in his 3d Inst. p. 35. mentions that the rack, or
brake, in the Tower, was brought into England by the duke of Exeter,
 in the reign of Henry the Sixth, and condemns the use of it. *Campion*,
 a jesuit, was put to the rack in the reign of Q. Elizabeth. *Camd. Eliz.*
 p. 476, and in Collier's Ecclesiastical History other instances during the
 same reign are mentioned, particularly that of *Francis Throgmorton*, who was
 eldest son of *John Throgmorton*, justice of Chester. Vol. ii. p. 591. Bishop
 Burnet likewise, in his History of the Reformation, takes notice that
Ann Askerw was tortured at the Tower in the year 1546, and that the lord
 chancellor, throwing off his gown, drew the rack so severely, that he
 almost tore her body asunder. Vol. i. p. 342. It hath also been sug-
 gested to me, by an authority which I should be proud to mention, that
 it appears by the Cecil papers (published by Murden) all the duke of
 Norfolk's servants were tortured by order of Q. Elizabeth, and that the
 same queen threatened Hayward the historian with the rack. I have been
 informed likewise, that there is at Ashbridge, amongst Lord Ellesmere's
 papers, directions from Q. Elizabeth to the Lord President of the
 Marches, that tortures should be used in some examinations which he was or-
 dered to take at Ludlow. Ben Jonson therefore alludes to an instance of the
 rack's being threatened in his time: "and, like the German Lord, when

Torture still continues to be used in most countries in Europe, and amongst the rest in France, though honest Montaigne hath written with great warmth against it. Montesquieu hath likewise a short chapter, by which he would mean to condemn it; but it is the most fantastical in his whole work of the *Esprit des loix*: the very great abilities and learning, which appear almost in every other part of it, entitle him, however, to not only these, but greater, liberties with his readers.

The present king of Prussia hath, to his honour, abolished it in his own dominions: "La question se donne en Allemagne
"aux malfaitures après qu'ils sont convaincus, afin d'arracher de
"leur propre bouche l'aveu de leurs crimes: elle se donne en
"France pour averer le fait, ou pour decouvrir les complices;
"Il y a huit ans que la question est abolie en Prusse [g]."

"he went out of Newgate into the cart, took order to have his arms
"set up, &c. The judges entertained him most civilly, discoursed
"with him, offered him the courtesy of the rack; but he confessed," &c.
P. 694. ed. 1692. amongst his "*Discoveries*."

I shall close these additional proofs of the practice of torturing in England by an extract from Dalrymple's Memorials, to which I was referred by a most-learned and ingenious friend, to whom I have not only this obligation.

After having stated the interrogatories (upon which Peacham was examined), this indorsement in the hand-writing of Mr. Secretary Winwood follows:

"Upon these interrogatories Peacham this day (Jan. 19, 1614) was
"examined before torture, in torture, between torture, and after torture;
"notwithstanding nothing could be drawn from him, he persisting still
"in his obstinate and insensible denials and former answer." Dalrymple, Mem. p. 58. Torture was used in Scotland so late as the year 1690, in the case of one Payne, being inflicted by the privy council. Dalrymple's Mem. of Gr. Br. part ii. p. 128.

[g] *Dissertation sur les raisons d'établir ou d'abroger les loix*, attributed to the king of Prussia.

The Marquis *Beccaria*, who seems to have adopted most of *Montesquieu's* ideas, makes use of the following argument against the use of torture: "The person suffering this agony either confesses, or not; if he is guilty, and does not acknowledge his crime, he is acquitted when he deserves death. If the accused is innocent, he hath been tortured, when the putting him upon his trial was more than sufficient punishment [*b*]."

He likewise observes that those states of Europe who permit torture in the course of civil justice, never allow it to be made use of in their camps, where the martial law takes place.

Ammianus Marcellinus informs us that the *Ægyptians* shewed remarkable firmness whilst under the most excruciating pain to extort a discovery from them, "apud eos [*Ægyptos*,] erubescit, si quis non insitiando tributa plurimas in corpore vibices ostendat; et nulla tormentorum vis inveniri adhuc potuit, quæ obdurato illius tractûs latroni elicere potuit, ut nomen proprium dicat [*i*]."

The 6th chapter of these statutes was intended to promote the breed of large and strong horses, to which there was then a very particular attention, as appears by several laws of this reign, with the same title; for this purpose, it is enacted, that no one shall keep a stallion which is not fourteen hands high [*k*]. *Carew* (in

[*b*] *De i delitti e delle pene*, p. 78, ed. Harlem, 1766.

[*i*] L. xx. c. 16.

[*k*] By 33. Hen. VIII. cap. v. (which is printed at length by Rastal) the same anxiety in the legislature for promoting the breed of large horses appears, and some of the regulations are rather singular. Every archbishop and duke is obliged under penalties to have seven stoned trotting horses for the saddle, each of which is to be fourteen hands high at the age of three years. There are afterwards many minute directions with regard to the number of the same kind of horses, which are to be kept by other ranks; and the lowest class mentioned is that of a spiritual person having benefices to the amount of 100*l.* per ann. or a layman, whose wife shall wear any French hood or bonnet of velvet: such are obliged (under the penalty of 20*l.*) to have one trotting stone-horse for the saddle.

This

(in his account of *Cornwall*), supposes that this law hath been the occasion of losing a smaller and more useful horse, which was almost peculiar to that county; whether it arises from the same cause I will not pretend to say, but it is certain that the Welsh pony is scarcely to be found in the principality at present [1]. It may, perhaps, appear to be a whimsical conjecture; but I should suppose, that the occasion of desiring a stronger breed of horses than the country naturally produced, arose from tournaments being in vogue as well as other very expensive and magnificent pageantries in the early part of this reign [m]. Besides this, we find by 14 and 15 Henry VIII. cap. iv. that a great number of

This statute continued in force till the twenty-first of James the First, which is the most comprehensive act of repeal in the Statute-book. It was indeed previously altered by 8 Eliz. cap. viii. as to the Isle of Ely, Cambridgeshire, and many other counties, which the preamble recites, "on account of their rottenness, unfirmness, moisture, and waterishness, were not able to breed or *bear* horses of such a size."

There is an entry in the Journals of the house of Lords, which shews how much they had this bill at heart: "Hodie (viz. 15 June) tandem lecta est Billa educationis equorum procerioris staturæ, et communium consensu, nemine discrepante, expedita." In the 43d year of Q. Elizabeth, a bill was proposed in the same house, *for restraining the superfluous and excessive use of coaches*, which was rejected upon the second reading. The Lords, however, direct that the attorney-general should peruse the statutes with regard to promoting the breed of horses, and consider of some proper bill in its room. Journals, November 7, 1601.

[1] Yet Mr. Ray, in a discourse on seeds and plants, read before the Royal Society in 1674, asserts, that he had seen many horses in Wales that did not exceed some dogs, and for price were rated at no more than half a crown, or ten groats, a piece. Birch's Hist. R. S. vol. iii. p. 171.

[m] Sir Thomas More, in the collection of his poems which go under the name of *Epigrams*, pays his court to the new king, by commending both the magnificence of his tournaments, and the good regulations which he had introduced with regard to the making this extraordinary amusement more safe than it had been.

Englishmen went into foreign services [n], and, as armour was still used, horses of strength were absolutely necessary.

The 10th chapter relates to uses and wills; and there is a proclamation published, in consequence of it, by *Berthelet*, in the same year.

Lawyers have dwelt much upon the benefits or disadvantages arising from the introduction of *uses* and *trusts*. *York*, one of the judges at the time this act passed, says, "it is absurd that I should enfeoff another with my land, and yet claim it against my own gift [o]." And in the same case likewise the great point is agitated, whether a *use* and a *trust* is the same [p], as also whether there were either uses or trusts by the ancient common law.

The first case in which the court of chancery determined upon a feoffment to an use, seems to have been in the 18th of Edward the Fourth [q]. A woman made a feoffment before her marriage upon certain trusts, and afterwards being under coverture directed by her will, that the feoffees should convey an estate to her husband in fee. The husband sued a subpoena against the feoffees, in order to take the opinion of the court, whether this will was good or not; and it was considered as a case of some

[n] Pasquier likewise takes notice of this in his *Recherches de la France*: "Le Roi (scil. Francis the First, contemporary of Henry the Eighth) ayant fait une trefve de dix huit mois avec l'Anglois, il prit conclusion en son conseil d'aller guerroyer de gayeté de cœur l'Allemagne, à laquelle enteprise se joignirent de mesme cœur quelques compaignies Anglesches." p. 134.

[o] Year Books, Term. Pasch. 27 Hen. VIII.

[p] Roper, in his Life of Sir Thomas More, mentions the reasons, why the judges would not consider a trust to be the same thing with an use. p. 25, and seq. The term *trouste* is used by the Abbé Mably, in his Observation on the History of France. Genev. 1765. Sous la *trouste* ou la foi du Roi, p. 73.

[q] Year Book, Term. Mich.

importance,

importance, because some of the judges assisted the chancellor. One of these assessors seemed to think it good in chancery, being a *court of conscience*; the other judges, in concurrence with the chancellor, agreed, that, as the will was void at common law, it was so to be considered in that court.

The next case is in Michaelmas term, the twenty-first of Edward the Fourth, when it was attempted to make the feoffment of an infant, under the age of fifteen, good, after the execution of which he conveyed a secret trust to the feoffees by parole. This was likewise determined to be void, and in Hilary term the fifteenth of Henry the Seventh, it is agreed by the judges, that the *cestuy que use* hath no right whatsoever to the land, but by permission of the feoffees.

These cases are not, indeed, such as will be probably looked after by a modern practitioner in a court of equity: they shew, however, that these *fidei commissa*, and ingenious inventions, were at first much discountenanced. The preamble to the statute likewise inveighs much against the ill consequences arising from them [r], and therefore, as lawyers somewhat technically express it, *executes the possession to the use*; or, to speak more intelligibly to a common apprehension, *unites them*. It would have been still more commendable, perhaps, to have, in many instances, abolished them; for why is any one, either in the possession or transferring of his property, most unnecessarily to make use of the intervention and name of another? At least, in the greater

[r] Lord Hardwicke (in Davenport and Oldys, July 17, 1738) speaks thus of this statute, "*and by this means a statute made upon great consideration, introduced in a solemn, pompous manner, hath had no other effect than to add at most three words to a conveyance.*" Atkins's Reports, p. 561. It is one of the instructions to the earl of Suffex, lord deputy of Ireland, that he should introduce a statute of uses. Cox's History of Ireland, p. 315. The reason of which probably was, that the forfeitures to the king might not be evaded.

part of worldly transactions, this is by no means requisite; on the contrary the bringing such a number of parties before a court, in case any dispute arises upon such a deed of trust, is often attended with infinite inconvenience. As lord Verulam hath an elaborate reading on this statute, which seems to be much the most accurate and complete of all his treatises on the law; I shall not obtrude any more of my own crude observations, but refer the reader to this more satisfactory authority.

The latter part of this tenth chapter of the statutes of this session relates to wills; and as every one for the two last centuries hath had the power of devising his land, it may perhaps be thought extraordinary, that this should not have been derived from the common law [s], but from an act of parliament. The principal reason of this I take to arise from so few being capable formerly of writing a will, or having an opportunity to procure a person so qualified. If it is said, that by the common law every one had a right thus to dispose of his personal property; the answer is, that personal estate was anciently one of those *minima, de quibus lex non curat*. Besides this, land, in all other instances, could not be transferred without the approbation of the king, or the superior lord; and a fine was paid for the obtaining his consent to such alienation. The will, moreover, could not be opened, or known, till after the testator's death; and possibly the devisee was the mortal enemy of the feudal lord, who would not permit such a tenant to be imposed upon him. These, or other reasons, must have occasioned this power's not being given to the owner of land by the common law, as in most other countries [t] the subject hath this indulgence,

[s] There are instances in Rymer of the kings of England empowering particular persons to make their wills; particularly of Edward the Third giving this licence to his son the *Black* prince.

[t] By the laws of the Twelve Tables, "Pater familias uti lecafit
"super pecuniae tutelae fouai rei, ita jous estod." There are many regulations

dulgence, which seems to be a great spur to industry, as well as a security of the dutiful behaviour of the relations to him who is invested with such a power.

As wills are often construed contrary to a fundamental rule, viz. *that they are to be expounded agreeably to the intention*, the testator might as well have continued to have had no such power [u]. The reason generally given for these decisions is, that precedents of other adjudged cases must be followed, as otherwise the law will be uncertain, and advocates will not know how to advise their clients. The answer to this seems to be, that there cannot be a case in point, unless the two wills are conceived *in verbis ipsissimis*, and made by testators in the same situation as well as circumstances; for it is sure strange to contend, that the will of a duke and a mechanic can be made with the same views. The first will probably be a disposal of pride, the other possibly of affection; and if the intention of the testator is to be followed (which all agree, if it does not contradict a rule of law [x]), the same words may reasonably receive a different construction.

As for the objection, *that advocates would not know how to advise their clients, if precedents were not followed*, I should think it may be still more easily answered: the advocate should read the will, and find out the testator's intention, without considering what

tions with regard to wills in the Koran; and Herrera mentions, that the native Mexicans had this power; so that it may be said to prevail as law in three parts of the globe. It is difficult to know, in the ancient ordinances collected by Lindenbrog and Baluzius, whether the Germans had this privilege or not, as Mabillon observes, that in the early ages *testamentum* signified any kind of contract. De Re Dipl. p. 3. See also Nouv. Traité de Dipl. vol. i. p. 395. "on disoit alors, *Testament de donation, Testament de dot, Testament de liberté, Testament de vente*, et tant d'autres."

[u] The old form, in which English wills were drawn 150 years ago, was commonly, *My will and mind is*.

[x] As if a testator *devises a perpetuity*, which he cannot do by any words, though most clearly expressive of his intention.

determinations have been made upon seemingly similar words. I remember therefore to have heard a learned judge, within these few years, thank the bar, for not having cited any cases, as every will was to stand upon its own bottom. If it would not be thought too presumptuous, I would venture still to go further, and contend, that the same rule should prevail with regard to the construction of a deed; nor is it proper to suppose, that they are all drawn with the strictest accuracy and best advice, when it is well known, that the greater part are never revised, but by those whose imperfect knowledge of the law is, perhaps, rather productive of more errors, than if the deed was penned by one who had not what is called a professional education. It is in short to suppose what is contrary to the fact, and as well as every one's experience; and an argument built upon such grounds can never carry with it, or deserve, any great weight.

STATUTES

STATUTES MADE AT WESTMINSTER,

31 Hen. VIII. A. D. 1539.

THIS session of parliament is remarkable, not only for some of the laws which continue in force, but likewise for others which were preferred, and rejected, as well as some which passed indeed, but were either repealed, or suffered to expire. The manuscript *Calendar* of the Journals of the house of Lords begins with this reign, by which it appears, that, in the year 1539, a bill was *preferred* to the house of Lords, by the lord chancellor, *concerning husbands and wives, together with a book containing diverse heads thereon*. We have no further light from the *Calendar* with regard to this bill, which must be allowed to have an extraordinary title. I should suppose, however, that the purport of it was to make divorces more easy; and that the book, which the chancellor brought with him to the house, was a treatise, written by Henry the Eighth, on that subject. He is well known to have been a man of letters [y], and to have entered the lists as a polemical divine [z]; his own divorce from *Catharine of Arragon* having therefore raised so warm

[y] He was, likewise, very musical. An anthem of his composition is sometimes sung at Christ-church cathedral: it is what is called a *full anthem*, without any solo part, and the harmony is good.

[z] Milton, in his answer to the Eikon Basilike, observes, "that kings have gained glorious titles by writing against private men, as Henry the Eighth did by attacking the doctrines of Luther; but that no private man ever gained honour by writing against a king, as not meeting with that force of argument in such courtly antagonists, which to refute, may add to his reputation." Political Works, vol. i. p. 361.

a controversy, it is probable he had read much upon this particular subject; and it must have made the deeper impression, as he was so much interested in the decision of that point.

The 8th chapter of the statutes of this year enacts, that the king, with the advice of his council, may *set forth* proclamations, under such penalties as he shall think proper, provided they do not extend to forfeiture of land or life; and, if any one leaves the kingdom with intention to avoid a prosecution thereon, he is *adjudged to be a traitor*. This statute is most properly repealed by the first of Edward the Sixth, and must be allowed to be, perhaps, the most unconstitutional of all the tyrannical acts of this reign. The latter part of it is so singular, that it must have been occasioned by an intention to issue a proclamation, which would have immediately affected some particular person who was on the point of leaving the kingdom; I must admit, however, that I cannot, from the history of the times, discover what person was in view.

The 10th chapter is entituled, *For placing of the Lords*; and the Calendar of that house informs us, that it was presented by the lord chancellor, *in consequence of the king's special command*. Bishop Burnet, in his History of the Reformation, observes upon some mistakes of Selden with regard to this statute:

“ There is another act, which but collaterally belongs to
 “ ecclesiastical affairs, and therefore shall be but slightly
 “ touched. It is the act of the precedency of the officers of
 “ state, by which the lord vice-gerent has the precedence of all
 “ persons in the kingdom, next the royal family; and on this
 “ I must make one remark, which may seem very improper
 “ for one of my profession, especially when it is an animad-
 “ version on one of the greatest men that any age has pro-
 “ duced, the most learned Mr. Selden. He, in his Titles of
 “ Honour, says, ‘ That this statute was never printed in the
 “ statute-book, and but incorrectly by another, and that there-
 “ fore

“fore he inserts it literally as it is in the record.” In which
 “there are two mistakes. For it is printed in the statute-book
 “that was set out in that king’s reign, though left out in some
 “later statute-books; and that which he prints is not exactly
 “according to the record. For, as he prints it, the bishop
 “of London is not named in the precedency; which is not
 “according to the parliament-roll, in which the bishop of
 “London has the precedence next the archbishop of York;
 “and though this is corrected in a posthumous edition, yet,
 “in that set out by himself, it is wanting; nor is that omis-
 “sion among the errors of the press, for, though there are
 “many of these gathered to be amended, this is none of them.
 “This I do not take notice of out of any vanity, or humour
 “of censuring a man so great in all sorts of learning; but my
 “design is only to let ingenious persons see, that they ought
 “not to take things on trust easily, no not from the greatest
 “authors [a].”

The 13th chapter laid the axe to the root of popery, by the dissolution of monasteries and abbies. Bishop Burnet informs us, that, previous to this statute, there was a book written by one Simon Fish, of Gray’s-Inn, entitled *The supplication of the beggars, against the strong and idle*, which, consisting of invectives against the manners of the clergy, was presented to the king by Anne Boleyn, and had at that time a great run. The preamble recites a *voluntary and free surrender* [b] by the ecclesiastical houses, which I shall, without hesitation, add to the list of statutes which recite falsehoods. Possibly
 this

[a] Burnet, vol. i. p. 264. Mr. Locke thought the settling precedence so material, that he hath made it the concluding article of his Regulations for the government of Carolina.

[b] The form of this surrender may be seen in Burnet’s History of the Reformation. The reciting it to be voluntary, was insisted upon from every religious house, “Sciatis nos præfatos abbatem et conven-

this is alluded to in the following lines, from a satyrical poem on Cardinal Wolsey :

“ Through all the lande he caused *perjurye*,

“ And afterward toke away their money

“ Proceedinge most tyrannouslye.”

It is generally supposed, that this dissolution of monasteries occasioned the provision for the poor in the latter end of Queen Elizabeth's reign, which I should much doubt. In the first place, I do not find that great numbers of poor are subsisted by the monasteries which continue still in the Roman Catholick countries. Dr. Ducarel informs us [c], that he paid a particular attention to this point in the province of Normandy, and could not discover that the poor had any very considerable charity or support from the religious houses. Besides this, the forty-third of Elizabeth was near sixty years after the dissolution; and if the poor, at any time, found the difference, it must have been more sensibly felt in the first years after this statute took place.

Though the law was not probably attended with that most inhuman consequence, the starving of the poor; yet I should imagine, that it was the occasion of a great increase of law-suits. Roper, in his Life of Sir Thomas More, informs us, that though he was an advocate of the greatest eminence, and in full business, yet he did not by his profession make above four hundred pounds per annum; there is a common tradition on the other hand, in Westminster-hall, that Sir Edward Coke's gains, at the latter end of this century, equalled those of a modern attorney-

“ *tum unanimi consensu et assensu ac spontaneâ voluntate dedisse,*” &c. Appendix to Widmore's History of Westminster-Abbey, p. 211. See Blackstone, Vol. I. p. 478. 8^{vo}.

[c] In a Tour through Normandy, published in 1755.

general

general [d]. It is likewise said, that the value of the places of the prothonotaries of the common pleas, in the reign of Queen Elizabeth, were 6000*l.* per annum. These facts seem indubitably to prove, that, soon after the present statute, the business of the courts of Westminster-hall had infinitely increased [e]. The dissolution of the monasteries threw that land into circulation, which before was unalienably fixed in a religious house; and it may be remarked, that colleges have very few law-suits; being flux bodies, they choose the immediate dividend, rather than wait the event of an expensive decision.

The compilers of the Parliamentary History mention the having seen an edition of *Fabian's Chronicle*, in which the word *Pope* is erased throughout, and thence suppose a proclamation to have issued this year, in which it was forbid to use that odious name. It should, perhaps, be rather attributed to the indiscreet zeal of some enthusiastick reformer.

Protestantism hath been so long established in this country, and to its so very great improvement, that one may venture to

[d] It hath been suggested to me since the first edition, that it appears, by Lord Verulam's works, he made £.6000 per ann. whilst in this office. Brownlow's profits likewise, one of the prothonotaries during the reign of Q. Elizabeth, were £.6000 per ann. I received this account from one who had examined Brownlow's books, and who also informed me, that Brownlow used to close the profits of the year with *laus Deo*—and, when they happened to be extraordinary, *maxima laus Deo*.

[e] If it should be asked what may have occasioned the present decrease of law business, I should suppose that it arises from the stamp duties, and the law being *more certain, as well as understood upon principles*; but chiefly from 200 millions being vested in the funds, with regard to the *security* of which no dispute can arise. I suppose, by this, the remaining part of the national debt to belong to foreigners.

Robert Lord Cromwell, (who died in the reign of Henry the 6th), spent in less than half a year 2000 marks in a law-suit for the manor of Ampthill.—Itinerary of William of Worcester, p. 162. Cambr. 1778, 8^{vo}.

mention.

mention a supposed advantage to Christendom, from the great influence of the popes in former centuries, without being suspected of being tainted with the gross absurdity of the popish doctrines, or a wish to see them re-established. As Englishmen, we are, with reason, indignant at the submission made by King John of his crown and rights to the see of Rome; but still there was a great use to Europe in general, from there being a common referee in all national controversies, who could not himself ever think of extending his dominions, though he often might make a most improper use of his power as a mediator [f]. The ancients seem to have found the same convenience in referring disputes to the oracle at Delphi.

Must not a Protestant then admit, that (when the weaker state was oppressed by the more powerful, and when there were no alliances between the different parts of Europe to support each other with a certain number of troops, in case of an attack,) there was often convenience in appealing to a mediator, who by the terror of his anathemas might say with effect, "*Your conquest and oppression must not extend any further. I have taken the op-*

[f] The popes have raised most exorbitant contributions upon the different countries of Europe, professing Christianity, by every kind of abuse; but they have seldom thought of extending their dominions, and the papal territories are not believed at present to be so considerable as they were some centuries ago. The intercourse with the court of Rome also was certainly the first means of civilizing this country.

Mr. Johnson observes, that the clergy of this kingdom suffered more than the laity from the pope, as the laity paid no tax to Rome, but Peter-pence, which was as nothing compared to those tenths upon tenths which were frequently exacted from the clergy. Preface to the Collection of Ecclesiastical Laws, p. xiii. This and many other hardships they certainly experienced, and their privileges in counterbalance were that they could not be hanged, or corporally punished, by the hands of laymen, though they might deserve it; at least they could not be so treated without the bishop's consent. Ibid. p. ix.

"pressed

"pressed under my protection?" and was not England delivered from a foreign army in possession of the capital, by the intercession and menaces of the pope [g]?

The 14th chapter of these statutes is entitled, "*An act for abolishing diversity of opinions in certain articles concerning the Christian religion*," which I should not have observed upon, did not Grafton in his Chronicle inform us, that it was called *the Bloody Statute* [h].

[g] The army of Lewis, the son of Philip of France, who acted not barely as an ally of the barons, but openly claimed the crown of England. The dispute between Spain and Portugal, was also settled by the same intervention; and, perhaps, the present claimants of Poland would thus better decide their differences than by any other medium.

Favin (in the Théâtre d'Honneur) gives us part of the service used at the coronation of the king of France, in which this title to the crown of England is *supposed* to be recited:

"Oremus,

"Ita tamen ut regale folium, videlicet Saxonum, Merciorum, et Northanhimbrorum sceptrum non deferat, ut *utrorumque populorum* debitâ subjectione fultus, &c." Favin, vol. ii. p. 1021.

If this was first introduced into the coronation-service when Lewis became king of France (as Favin alledges), it is very particular, that the word *Angli* should have been omitted: and though it is to be hoped, the kings of England will never be enthroned at Paris, yet no Englishman should ever allow, that the French pretensions to the crown of England are equal to our claim on that of France.

[h] Grafton's Chron. p. 174.

STATUTES MADE AT WESTMINSTER,

34 and 35 Hen. VIII. A.D. 1542-3.

THE first chapter of the statutes of this year is levelled against the *false translation* of the Bible by *Tindal*; and likewise directs, that the New Testament, in English [*i*], shall not be read by *women* [*k*], *artificers*, *'prentices*, *journeymen*, *serving men* of the degree of *yeomen*, or under.

[*i*] In the year 1539, a proclamation issued *De Bibliis in vulgari edendis*, Ames's History of Printing, p. 498; and, in the year 1541, another proclamation followed, that there should be a Bible in every church. Fab. Chron. 546.

It may not be improper here to insert the following spirited passage from Lord Herbert's Life of Henry the Eighth, with regard to the propriety of such a translation: "For if men should be once persuaded, " that they could make their own way to God, and that prayers in their " native and ordinary language might pierce heaven as well as in Latin ; " then, &c." p. 498.

[*k*] An exception afterwards follows, with regard to a noble woman, or gentlewoman, who is permitted to read the bible *to herself alone*, but *not to others*.

Another clause permits the chancellor of England, captains of the warres, the king's justices, and recorders of towns, not only to read the scripture, but to expound it in any good and virtuous exhortation. See the Statute in Rastal. The reason for the exception, in favour of judges and recorders, arose from its being customary at this time for these magistrates to begin their charges by a text of scripture. There were also then no regimental chaplains; and the duty of preaching therefore fell upon the *captains of the warres*, whose rank answered perhaps to that of colonel at present.

The original name of this *Tindal* was *Hitchins* [1]; he travelled much in Germany; printed his translation of the New Testament at Antwerp in 1526, and afterwards both the Old and New Testament at Paris in 1536 [m]. Bishop Burnet informs us, that the opposition to this translation arose from the convocation [n], who, within three years, published another version under their own inspection; and yet it is very singular that he does not give us the names of those who were thus employed by authority [o].

It is generally supposed, that the English of the Bible hath fixed our language, which seems to have been too implicitly admitted. Surely the modern English differs much, both in the

[1] Tanner's Bibl. Whilst he was in Germany, he assumed the name of Thomas Matthew.

[m] Ames's History of Printing.

[n] There is in Rymer a proclamation in *English* of the year 1539, which is entituled, *De Bibliis in vulgari edendis ex supervisione Domini de Cromwell*: Tindal had therefore probably neglected proper application and respect to the *Vicar-general*.

[o] Johnson, indeed, attributes the first publication of the Bible in English to William Tindal, John Rogers, and Dr. Miles Coverdale, in the year 1535. See the Preface to his *Holy David vindicated*, Octavo, 1706. He also then gives some short account of the lives of these three translators. Ibid. Coverdale became afterwards bishop of Exeter.

Fabian, in his *Chronicle*, says, that the Bible was translated into English by one Trevisa of Cornwall, in the reign of Richard the Second. There is now in the Museum a very fine manuscript, in vellum, of a French translation of the Bible, which was found in the tent of King John of France after the battle of Poitiers*; and Bullet (in his *Mémoires de la langue Celtique*) mentions a French translation of the Psalms in the king's library, which is as ancient as the eleventh century.

* It is stated, in the *Memoirs of the Academy of Inscriptions*, that the duke of Bedford, whilst regent of France, purchased the Louvre library, collected by Charles the Fourth and Fifth of France. See vol. ii. p. 703. This may therefore otherwise account for the Ms. Bible making part of the library of the kings of England, especially as it is too bulky for a campaign.

words used as well as phraseology [*p*], from the translation of the Bible, and comes infinitely more near to the English of the legislature in their acts [*q*]. I have already observed these to have continued in the *maternal tongue* (as the statutes of this reign frequently term it) from the reign of Richard the Third down to the present times [*r*].

The 26th chapter of this session is possibly the longest in the statute-book, being divided into 130 sections; if we perhaps except a modern land-tax act.

The title of it is, *An Act for certain ordinances in the king's dominion and principality of Wales*, and contains a most complete code of regulations for the administration of justice, framed with such precision and accuracy, that no one clause of it hath ever yet occasioned a doubt, or required an explanation. Though the

[*p*] "If I translate a French book into English, I turn it into English phrase, and not into French-English. *Il fait froid*.—I translate *il fait froid*, 'tis cold, not it makes cold; but the Bible is rather translated into English words, than English phrase. The Hebraisms are kept, and the phrase of that language is kept; as for example, *he uncovered her shame*, which is well enough as long as scholars have to do with it; but when it comes amongst the common people, Lord what jeer do they make of it!" (Selden's Table Talk, article, THE BIBLE).

This expression is not now jeered at, however, by the common people, which shews that the language hath in time obtained a sanctity and reverence, with which it was not at first received. For some other curious particulars with regard to the translation of the Bible, see the same *Table Talk*.

[*q*] Villadiego (in his Preface to the *Fuero Jusgo*) gives us a much more extraordinary instance of the purity of the Spanish language used in their ancient laws, which he affirms to be more intelligible than that of other ordinances made six hundred years afterwards.

[*r*] The English of the statutes of Richard the Third and Henry the Seventh is more pure than those of the reign of Henry the Eighth, which arises from the preambles of the latter being more figurative in the expression.

Calendar of the Journals of the House of Lords begins with the first year of this reign, yet I cannot find any thing relative to this most excellent law; and therefore the principality must for ever remain ignorant of their greatest benefactor [s].

The statute begins by dividing Wales into twelve shires; Lord Herbert of Cherbury, in his Life of Henry the Eighth, informs us, that before this it consisted of one hundred and forty lordships marchers, with *jura regalia*; and that the great view of the legislature was to reduce their jarring customs to uniformity.

Previous steps had been indeed taken to introduce a thorough union of laws between the two countries, by statutes which passed in the twenty-sixth year of this king's reign.

One of these [t] most particularly enjoins, that the jurors in Wales, who are recited to be frequently tampered with, should

[s] There were representatives for Wales at this time by the twenty-seventh of Henry the Eighth, when an act likewise passed, for sending two members to the English parliament from Calais. (See Petyt, Mss. vol. vi. p. 275). The Journals of the House of Commons do not however begin till the reign of Edward the Sixth. I find no further mention of this bill in the Journals of the House of Lords, which I have lately had an opportunity to examine, but that it was read once on the 24th of February, 1542, a second time on the 26th, and a third time on the last day of April. It should seem to have taken its rise in that house, as there is no entry of its being brought from the Commons.

I cannot find any light from the Sydney papers with regard to this statute, which might naturally be expected, as Sir Henry Sydney was now lord president of the marches. *John Voisie* bishop of Exeter filled this station for many years, and continued in that office till the twenty-fifth of Henry the Eighth. He is said to have been a very able and learned prelate, which might have occasioned his having thought of at least such a plan of union, and perhaps delivering it to his successor Rowland Lee bishop of Coventry, who was lord president of the marches at the time this statute passed. See Powel's History of Wales, p. 393, et seq.

[t] 26 Hen. VIII. cap. iv.

not, without leave of the court, be permitted to have either meat or drink [u], which shews, that for some time the trial by jury had prevailed in those parts of the principality at least, where there had been an opportunity of introducing the English laws. It is for this reason that the present statute continually refers to, and approves of, the law as used in the maritime counties of North-Wales, because Edward the First, and his successors, by means of their garrisons in those counties, were the

[u] The ill effects of a bribe to a jury, by their being better feasted perhaps by the plaintiff than the defendant, are not now apprehended, though I am persuaded this was the cause of this injunction; as Sir Thomas Smith mentions, that in his time it was usual for the party, who obtained the verdict, to give the jury a dinner. (Commonwealth, p. 75). I must admit, however, that Sir Henry Spelman derives this restraint from an ancient canon, "*quod de nocte non est honestum judicium exercere.*" Rel. Spelm. p. 89. which at the same time accounts for the jury being denied candles, if the leave of the court is not obtained. We now think the regulation a wise one, and adhere to it, because it contributes to the greater dispatch of business; causes at this time, however, did not *hang* as they do at present: one reason for which (amongst many others) arose from all witnesses in civil causes being examined by the judge, as is still the practice at the crown bar. This information with regard to the ancient practice I remember to have heard from an aged and eminent serjeant, who likewise believed the first precedent for an adjournment to have been within these forty years. Adjournments are, by the great diligence and spirit of the present bench, avoided as much as possible: if a cause, however, lasts more than sixteen hours, it is ridiculous to call it a decision, as attention to the evidence cannot be longer expected.

Stiernbook expresses himself in the following manner, with regard to the confinement of an English jury: "*Ad absolvendum verò vel condemnandum, in Angliâ, necessitate compelluntur, atque eosque famelici et quasi captivi includuntur, nemine intromisso, donec absolverint seu condemnaverint.*" *De Jure Sueonum et Gothorum vetusto*, Holmiæ, 1672, cap. iv. p. 59.

better

better enabled to enforce the establishment of the English ordinances [w].

Another statute soon followed [x], that no *Welshman* may carry with him to a court of justice, or place of public resort, any kind of offensive weapon; which shews that there were frequently great riots and insurrections in the principality. *Major*, however, who lived at this time, says, that the custom of going armed was by no means peculiar to Wales, "*In Angliâ* "ad templum, sine forum, sine armis vadit nemo [y]."

But the most material regulation previous to this statute is that of the 27th section of the twenty-seventh of Henry the Eighth, ch. xxvi. by which it is enacted, that the lord chancellor, immediately after the prorogation of the parliament, shall issue the king's commission, to inquire and search out, *by all ways and means, all and singular laws, usages, and customs, used within the said dominion and counties of Wales, and return and certify them to the king in council.*

This return, therefore, must have been made; though I cannot find it in Rymer, and must contain many curious particulars, upon which the present most comprehensive law of the thirty-fourth and thirty-fifth of Henry the Eighth was undoubtedly framed. Rowland, in his *Mona Antiqua*, informs us, however, that copies of the proceedings of these commissioners were deposited both in the chamberlain and auditor's office of North-Wales; and that Sir *William Gryffydd* of *Penrhyn*

[w] N° 4776 of the Harleian Mss. contains a most exact survey, or extent as it is called, of North-Wales, made in the 26th year of Edward the Third; and it is remarkable, that it contains only what relates to the counties of Anglesey, Carnarvon, and Merioneth.

[x] By 26 Hen. VIII. cap. vi.

[y] This appears likewise by the common etymology of the word *Wapentake*.

caused

caused them to be transcribed by one *Jenkyn Gwyn*, and that they are entituled the Extent of North-Wales.

I have already said, that this statute is so clear, that it never hath required any parliamentary exposition or alteration [z], much less does it want my illustrations; as the great lord Verulam hath barely abridged some of the regulations [a], thinking that they spoke sufficiently for themselves. Mr. Justice Dodderidge hath done the same in his account of the principality of Wales, without any observations, except *that the justices of the great session have the same powers with the ancient justices in Eyre*. He could not mean by this, that the justices in Eyre had the powers of deciding causes in a court of equity, which the justices of the great session have so long exercised, that it cannot be now disputed. How they originally obtained this jurisdiction [b] is rather dark, as in the present statute,

[z] The late statute, with regard to the courts of great session, recites no such doubt. By 5 Eliz. cap. ix. (the title of which is, "An act for the punishment of such as commit perjury") there is a clause declaring, that witnesses properly served with notice to appear before the courts of great session in Wales, who neglect attending, shall be liable to penalties and damages. This I should apprehend however to have been unnecessary: as these jurisdictions were constituted by parliament with the full powers of the superior courts in Westminster-hall, the attendance of witnesses when summoned seems to follow as a necessary consequence.

[a] Bacon's Law tracts.

[b] Dodderidge says, that *the Prince* held a court of chancery and of exchequer at Carnarvon and Carmarthen. P. 35. By a manuscript of all the officers paid by the crown, in the first year of Queen Mary, it appears, that Roger Vaughan was chancellor of Brecknock, with a fee of 6*l.* 8*s.* but Walter Devereux, viscount Hereford, was at that time Justice. Sir John Salisbury was likewise then chancellor of North-Wales, and William Cook was Justice. So that the offices in that reign were considered as distinct. Dr. Harris, in his account of Kent, mentions, that there hath been a court of equity to mitigate the law, held at Dover, time out of mind. There is likewise such a jurisdiction for the counties Palatine.

which most particularly enumerates every officer in the courts of law, there is not the least allusion to any proceedings in Equity.

By the 37th chapter of the twenty-seventh of Henry the Eighth, the king is indeed empowered, *for the next five years, to erect and constitute what courts he shall please*; during which time he might possibly have instituted the courts of equity in Wales; but it is still singular, that the present statute should be entirely silent with regard to any such jurisdiction or officer belonging to it. The king had likewise power to alter the laws of Wales according to his discretion, the abolishing of which made one of the articles on the part of the House of Commons in what was called the *Great contract*, when James the First proposed giving up the court of wards, &c. in consideration of £.200,000 *per ann.* The repeal of this power accordingly followed in the twenty-first year of the same king's reign, when the lord chancellor dwells upon its being a bill of *grace* [c]. The courts of chancery therefore might have been established between the year 1535 and 1623.

Bishop Godwyn, in his Life of Henry the Eighth, much commends this statute of union between England and Wales; and says, that the good effects of it were fully experienced at the time he wrote; from these advantages he strongly presses an union of Scotland.

Henry the Eighth lived to hold two sessions of parliament after this; but nothing occurs in the statutes of those years, which is deserving of particular notice or observation.

He began his reign with the greatest expectations of his people; and in this, according to Bishop Godwyn, they were not deceived in the twelve first years, which may be compared to the *Quinquennium Neronis*. He was, in the early parts of his life, magnificent and generous; but afterwards his prevailing

[c] See Journals of the House of Lords, July 20, 1610; and May 26, 1614.

passion appears to have been that of tyranny, attended with no small degree of cruelty. He was the first king of England, who was styled *metuendissimus*; and no predecessor, or successor, ever equally deserved the epithet [d].

He had more learning than commonly falls to the share of a king [e]; and Bishop Burnet informs us, that he had seen many statutes if not entirely drawn by him, at least altered or corrected with his own hand; his pen may, therefore, be said to have often been dipped in blood, as every session almost produced new treasons and felonies. Hollinshed asserts, that 72,000 criminals were executed during his reign, which amount nearly

[d] If we are to believe however the Journals of the House of Lords, never was the death of a king more lamented by his subjects: "Quæ mors dici non potest quam erat luctuosa omnibus, et tristis auditu. Cancellarius verò ipse vix potuit præ lacrymis effari. Tandem verò, sedato fletu, et resectis animis omnium recordatione principis Edwardi Sexti." See Journals, January 31, 1547. The almost Asiatic veneration and prostration, which was shewn to this king, appears by an entry in the same Journals: "Ecce Regia Majestas purpuream togam induta splendide in theatrum (viz. the House of Lords) venit, et per medium transiens, assurgentibus omnibus, cum admirabili dignitate in solium ascendit et resedit.—Cancellarius dein omnes præsentis admonuit qualem habeant principem, quam bonum, quam sapientem, quam circumspectum, et per omnia fortunatum; adeo ut in progressu orationis quoties venerat mentio Regiæ Majestatis (*id quod sæpe accidit*) illico ad unum omnes humi sese tantum non prosternerent." Journals, January 16, 1541. We find, by the same authority, that the speaker sometimes dwelt much upon his beauty, comparing him to *Abraham*.

[e] Lord Verulam, in the short sketch of an intended history of the reign of Henry the Eighth, says, that, "though his learning was considerable, yet therein he came short of his brother Arthur," vol. iii. p. 115. Erasmus, likewise, in his Epigrams, alludes to the early knowledge of Prince Arthur:

"Præcoqua nec tardam expectat sapientia pubem,
"Prævertit annos indoles ardens suos."

to 2000 a year [*f*]; whereas he says, that, in the latter end of Queen Elizabeth's, the number did not exceed 400 [*g*]. I must own, I cannot but think there is either great exaggeration in the account, or an egregious mistake in this chronicler, who is generally very accurate [*b*]; for though I believe that the world rather improves in point of morality and social duties, from century to century, yet this is too great a disproportion in the comparative number of criminals, who might be condemned to suffer [*i*].

We

[*f*] "Videbis ea sæpe committi quæ sæpius vindicantur. Pater tuus" (sc. *Neronis*) plures intra quinquennium culeo insuit, quam omnibus "sæculis insutos accepimus. *Putet se esse innocentem civitas; erit.*" Seneca.

[*g*] It is not believed that there are 100 criminals executed in a year at present; and the county of Middlesex furnishes a considerable part of them. Brunau, in his treatise upon *the criminal law of France* (printed at Paris in 1716), mentions the same kind of disproportion between the number of executions at *that time in France*, and *a century before*: I cannot, however, but distrust the account given by Hollinshed.

If we may believe Fuller, the duke of Alva bragged, at an entertainment, that he had caused 18,000 convicts to be executed. See Fuller's *Prophane State*, b. ix. c. xix.

[*b*] Hollinshed seems to deserve this character, notwithstanding Dr. Donne (for the convenience perhaps of the name to fill up the line) hath reflected on his veracity:

"so tells many a lie,

"More than ten Hollinsheds, or Halls, or Stowes."

Donne's Satyres.

[*i*] The milder punishment of transportation may indeed prevent many executions; but, in the time of Henry the Eighth, there seems to have been no alternative in capital offences but death, or a very long imprisonment. Fortescue, who was chief justice in the reign of Henry the Sixth (in his treatise on *Limited Monarchy*), gives the following reason for the number of executions in England, which is rather an extraordinary one from the mouth of a great magistrate: "More men are hanged in *Englonde*

X x x

"in

We should not dwell, however, entirely on the blamable part of *Henry's* character; but consider, on the other hand, if some laws may not have passed during his reign, which may make him deserve to be remembered with gratitude by posterity.

They, who conceive him to be a mere tyrant, have supposed that all the statutes against popery (to which we owe both our civil and religious liberties, ever so closely connected) have proceeded entirely from a desire to change one wife for another. If this might have had its weight upon particular occasions, it can hardly be conceived, that it was always the sole motive of the steps which he took to deliver his kingdom from this most ignominious thralldom; and it is more becoming those, who feel the benefits of salutary regulations, to attribute them to good than to bad motives, unless the proof is nearly irrefragable. Whether this merit may, therefore, be allowed to him or not, his having united England and Wales, by a wife uniformity in their laws, should never be forgotten by the two countries, when his tyranny and oppressions are dwelt upon; nor could the Reformation perhaps have been thoroughly established, if the king on the throne had not had an extraordinary firmness in his disposition.

“in one year, than in *Fraunce* in seven, *because the Englishe have better*
bartes: the Scotchmenne likewise never dare rob, but only commit larcenies.” p. 99.

It appears, by this citation from Fortescue, that the open robber was in these times considered as spirited and enterprizing, even by a chief justice of England.

STATUTES

STATUTES MADE AT WESTMINSTER,

I Edw. VI. A. D. 1547.

THE 12th chapter of the statutes of this session repeals most of the new treasons and felonies during the reign of Henry the Eighth, and recites, "That subjects should rather obey
" from the love of their prince, than from dread of severe
" laws; that as, in *tempest or winter*, one course and garment is
" convenient, and in *calm or more warm weather* a more liberal
" case, or lighter garments, both may and ought to be fol-
" lowed and used, so it is likewise necessary to alter the laws
" according to the times."

After this very singular preamble, it occurs to the legislature, that some of the offences, which had been made capital by Henry the Eighth, were proper to be restrained by the same severity of punishment; and therefore they excluded such as shall be guilty of murder, house-breaking, sacrilege, robbery, or stealing of horses, *geldings*, or *mares*, from the benefit of clergy.

This is the clause upon which the *well-known doubt* arose whether stealing a single horse was to be punished with death, and which afterwards required an explanatory statute. It seems, indeed, rather extraordinary, why this should be classed with crimes of the blackest dye; but *Hollinshead* takes notice that it was one of the most common offences at this time in a criminal calendar. He likewise mentions the name of a particular thief, who had at once sixty stolen horses in his possession; and that, if a buyer would not give him his price, he used to say,
" *he had given more himself, or otherwise by Jesus he had stolen*

X x x 2

" *him.*"

“*him.*” In the year 1584, ten criminals were executed at *Smithfield* for this crime [l].

The 10th section declares that the killing by poison shall be considered as wilful murder in the following words: Provided “also, and be it ordained and enacted by the authority aforesaid, that the wilful killing by poison of any person or persons, that at any time hereafter shall be perpetrated, or committed, shall be adjudged, deemed, and taken to be wilful murder of malice prepensed.”

What could have been the occasion of this very extraordinary clause must naturally be asked by every one who reads it. Mr. Justice Foster, in his Reports [m], hath taken notice of the different opinions of Coke, Kelyng, and Holt, on this part of the law, with none of which he appears to be satisfied, though it should seem to be doubtful whether his own solution of the difficulty may have been more happy. I shall give it in his own words:

“I take the true ground of the statute of the First of Edward the Sixth to be this: the twenty-second of Henry the Eighth had made wilful poisoning high treason, and had expressly excluded the offenders from clergy, and directed that they should be boiled to death. The First of Edward the Sixth reduced all treasons to the ancient standard of the twenty-fifth of Edward the Third. This was a virtual repeal of the twenty-second of Henry the Eighth; and so in the judgement of the parliament it became necessary to make some new provision for the case of wilful poisoning, which undoubtedly deserved a capital punishment; accordingly, by the 10th section of the act, the offenders are ousted of clergy. And the 13th enacted, not in *affirmance* of the common law, as *Kelyng* supposeth, but by way of *revival* of it, that the of-

[l] Stowe's Chron. p. 697.

[m] P. 68, 69.

“fence shall from thenceforth be deemed wilful murder of malice
 “prepenfed, and that the offenders shall fuffer and forfeit as in
 “other cafes of wilful murder of malice prepenfed.

“The taking away clergy by exprefs words, which is done by
 “the 10th fection, was, in my opinion, though Coke thinketh
 “otherwise, abfolutely neceffary; becaufe the ftatutes, which
 “oufted clergy in the cafe of wilful murder, were made while
 “the offence of wilful poisoning did not fall under the denomi-
 “nation of murder, but of high treason, in which the crime of
 “murder was merged: and, confequently, thofe ftatutes could
 “not reach the offence of wilful poisoning.”

The ftatute of the twenty-second of Henry the Eighth, al-
 luded to by Mr. Juftice Fofter, is printed at length in Raftal’s
 edition; and by the preamble it appears, that one John Roofe,
 a cook, had poisoned feventeen perfons of the bifhop of Ro-
 chefter’s family, two of which died. John Roofe, therefore,
 by a retrospective law, is made guilty of high treason, and he
 is ordered to be thrown into boiling water, the idea of which
 new punifhment poffibly arofe from Roofe’s having been a
 cook [n].

Shocking

[n] He threw the poison into a pot of gruel, which was prepared not
 only for the bifhop of Rochefter’s family, but the poor of the parifh, fo
 that it might have been nearly large enough for his execution. There
 is another instance of a retrospective ftatute to punifh a murderer, in the
 fecond and third year of Philip and Mary, which is publifhed likewise at
 length by Raftal. The preamble is a very long one, and recites a mali-
 cious and groundlefs appeal of robbery by one *Bennet* againft *Giles*
Rufford, on which *Rufford* having been acquitted, and having afterwards
 convicted *Bennet* for the malicious profecution, the latter not only paid
 40*l.* to two men for the actual murder of *Rufford*, but likewise fupplied
 them with javelins and a dagger for this diabolical purpofe. Horrible
 as the offence was, yet *Bennet*, having been abfent at the time the murder
 was committed, could only be confidered as acceffary; and the ftatute
 of Henry the Eighth, which takes away the benefit of clergy from mur-
 derers

Shocking as this crime must have been considered by the legislature, yet it was not thought proper to confound it with the offence of treason; the statute of Henry the Eighth is therefore repealed; but could it possibly follow from this, that killing by poison did not continue a murder by the common law? and, if a misdemeanor is made a felony by a statute, which is afterwards repealed, does it not continue a misdemeanor as before? The statute, whilst it continues in force, supercedes, indeed, the common law; but, when it is repealed, the common law is of course restored.

Perhaps, the truest reason and solution of these difficulties is the great ignorance of the proposer of this law, of which there are not wanting very sufficient proofs in other clauses of the statute. I have already mentioned part of the preamble, which is even ridiculous; and the insertion of *mares* or *geldings* after horses is another proof of this inability; as, for the same reason, a doubt might be raised, whether, if a statute makes the murder of a man felony, it might not be sufficiently declared whether it extended to that of a *woman*, or an *eunuch*. I am sorry to find, after this, that the present bill was referred by the House of Lords to Master Hales a serjeant at law [o], and that it was read no less than four *times* in that house [p].

derers, not having made mention of the accessory, according to the too great mildness in the common law, *Bennet* was entitled to this privilege, which therefore the statute deprives him of in case he is convicted. I have ventured to call this too great mildness in the law of England, because in treason, which is a still higher offence, there is no such thing as an accessory; and, in the above case of *Bennet*, there can be no doubt of his having been equally culpable with those who actually committed the murder. The 4 and 5 Philip and Mary, cap. iv. very properly therefore takes away this privilege from *accessaries before the fact* in murder, and many other offences; as do likewise more recent statutes, which have gone still further.

[o] Journals of the House of Lords, November 12, 1547.

[p] Journals, November 16, 1547.

If

If I may presume, however, to risque my conjecture, with regard to the occasion of this very singular clause, it is the following :

It was at this time a prevailing notion, that what was called *slow poison* [q] might be given to a person, which would infallibly kill him within a given number of months, or years. By our criminal law, if the death of the person murdered does not ensue within a year and a day after the stroke or stab, it is not considered as murder [r]. The legislature might therefore intend, that such poisoning should have all the consequences of a murder, provided the death ensued within a year and a day ; and for that reason directs, that they shall suffer as for a murder of *malice prepensed*, though *no stroke or stab* had been given [s], as the proof of the death occasioned by so lin-

[q] Shakespear alludes to this in his *Winter's Tale* :

“ I would do this, and that with no *rash poison* ;

“ But with a ling'ring dram, that should not work

“ *Maliciously* like poison.”

I should suppose that the word *maliciously* is here used in the sense it bears in the common forms of indictments for murder. Lambard, in his Topographical Dictionary, mentions, that a girdle, contrived to poison the Dean of York at a distance, was burnt in Tothill-Fields.

[r] By the laws of Bretagne, the death must ensue within forty days (d'Argentre), and by those of Lucca within thirty ; which seems to be a better rule in favour of the person accused, as it is believed to be often very difficult for a surgeon, or physician, to say, when so much time hath elapsed, whether the blow was the occasion of the death or not, especially if the bruise is inward. The year and day being thought by the legislature too distant a time, by 2 James I. cap. vii. (commonly called the *Stabbing act*) the death must ensue within six months after the stab.

[s] I take this to be the meaning of the maxim in the French law, “ *tel cuide ferir, qui tue.*” Hence also, by the ancient laws of Lower Germany, “ *Si vulnus non appareat, multa nulla esto.*” See Stiernhook, p. 348. who observes, in another part, “ *verbera, vel vulnera, quatuordecim dierum spatio præscripta fuisse,*” p. 382.

gering an operation must have been attended with infinite difficulty. Lord Chief Justice Hale for this reason informs us, that 1 James I. cap. 12. (which makes it felony to kill any person by the invocation of an evil spirit) was occasioned by there being no external appearance of violence which might make it criminal by the common law, though the offence was punished with death by that of the Romans [1].

This most horrid and atrocious of all crimes, the murdering by poison, cannot but alarm every member of society, who, if he harbours such a suspicion, must be the most unhappy of wretches; it fortunately, however, carries with it, from the manner of its being perpetrated, its own check. He who, hath the diabolical malice to intend the murder of his fellow-creature, but half gratifies it, if the person killed does not know that he receives his death from the hand of his enemy.

As no human precaution, however, should be omitted to prevent the crime's being perpetrated, it may not, perhaps, be improper to adopt the policy of an ancient Scotch statute [u], by which it is made high treason to bring any poison into the kingdom [x]. Might it not therefore be advisable to
make

[1] Hist. Pl. Cr. vol. iv. p. 429.

[u] Jam. II. Parl. 7. cap. 30. Baynes however (in his Institutes of the criminal law of Scotland) says, that this statute is considered as being in *desuetude*. Edinburgh, 1730, p. 211.

[x] It was probably by this chiefly intended to provide against the importation of poisons from Italy, where assassination, and this kind of murder, hath but too much prevailed. I have been often informed, that it is not uncommon in Italy to say, upon a man's expressing himself with regard to another, from whom he hath received an injury, *I wish he would but drink a dish of chocolate with me.*

“An Italian's revenge may pause, but's ne'er forgot.”

Fletcher's Fair Maid of the Inn.

The ingenious author of the Memoirs of Petrarch, however, conceives that this prejudice against the Italians arose from two or three supposed murders

make it capital, either to import, or vend, some kind of poisons, as the chief pretence for an apothecary's having arsenick in his shop, which is most commonly used by the murderer, is for the killing of rats, which may be destroyed by other methods; or, at least, should the sale be permitted, but under certain restrictions?

This is the only statute of the short reign of this young king, which seems to require any illustration. There were indeed four sessions of parliament, during which several laws were enacted; they rather consist, however, of statutes repealing what was done by the parliaments of the preceding reign, than make any considerable alteration in the common law. As for those which relate to the further establishment of the Protestant religion, I shall refer the reader to Bishop Burnet's History of the Reformation, as they are a most necessary part of that valuable work.

Edward was but nine years of age when he came to the throne, and died before he was sixteen. It is fortunate for the memory of these kings and princes destined to a throne, that, as they cannot offend any party, or faction in the state, they are always represented, by those employed in their education, as being of a most promising disposition [y]. By this, [part of the commendation due is reflected upon the instructors; and, when any unpopular act is therefore done in the succeeding reign, it is always supposed that the reverse would have happened, if the infant predecessor had lived to that time.

Proofs, however, are not wanting, that Edward had abilities rather *ultra annos*, and that he paid a very early attention

murders of this sort at Avignon, during the residence of the French popes at that place. Vol. i. p. 63. Amst. 1764, 4to.

[y] Thus Henry, prince of Wales, son of James the First, is supposed to have been a most promising prince; and the duke of Gloucester, son of Queen Anne.

to the laws which passed during his reign. An autograph journal, which he kept, is printed in Bishop Burnet's History of the Reformation, by the original of which, now in the Museum, the gradual improvements both of his understanding and hand-writing may be seen to keep pace from year to year: the first part is the scrawl of a child, which is scarcely legible. This Journal contains many schemes for improvements, particularly with relation to the woollen manufacture, the inclosing of waste grounds, and the preventing the offence of forestalling, as also that of the sale of offices [z]; with regard to every one of which points, statutes passed at the latter end of his reign; in which he may therefore be supposed to have been consulted by his ministers.

[z] It appears by the Calendar to the Journals of the House of Lords, that the Commons, for a considerable time, insisted that the clause in 5 and 6 Edw. VI. cap. 16. which allows the two chief justices to sell certain offices, should be rejected.

ACTS

ACTS MADE AT WESTMINSTER,

1 Mariæ, A. D. 1553.

THE first parliament of this reign, during the year 1553, was held at three different sessions, in the first of which a most truly constitutional statute passed, which reduced all treasons to those which were declared to be such by the twenty-fifth of Edward the Third. The new treasons, during the reign of Henry the Eighth, were those chiefly intended to be repealed; and some of the members of this parliament exclaimed with proper warmth against the severity of his laws, saying, *they were more bloody than Draco's, Dionysius's, or any other tyrant in history* [a].

The preamble to this most excellent law is to the same purport with that of the statute of Edward the Sixth last observed upon; but is so much superior in style, that I shall here insert part of it, for the sake of the comparison:

“Forasmuch as the state of every king and ruler standeth more
 “affured by the love of the subject towards their sovereigns, than
 “in the dread and fear of laws made with rigorous pains; and
 “laws also justly made for the preservation of the commonweal,
 “without extreme punishment or rigour, are more often obeyed
 “and kept, than laws and statutes made with extreme punish-
 “ments, &c.” This is the language of a legislator promulgating

[a] State Trials, vol. i. p. 76. It may be perhaps not improper here to mention one or two out of many of these tyrannical or severe laws. By 32 Hen. VIII. cap. xxv. it is made high treason by word or deed to accept, take, judge, or believe, the marriage, between this king and the *Lady Anne of Cleves*, to be good. By 33 Hen. VIII. cap. xiv. it is made felony, to declare any false prophecy upon occasion of *arms, fields, or letters*; which statute is printed at length by Rastal, and the preamble explains the occasion of it.

his laws with dignity: that of the statute of Edward the Sixth is the idle flourish of a rhetorician, or rather half-learned school-master [b].

It is very singular, that the first statutes, both of the preceding and present reign, should open with such strong reflexions on the laws and government of Henry the Eighth. This is indeed not uncommon when a kingdom hath been disputed; but no such instance can, perhaps, be found in history when two children have succeeded to a throne which they received from their father; it therefore shews most strongly, in what detestation those tyrannical statutes were universally held.

Four years after the passing this most constitutional law, Sir *Nicholas Throckmorton* often insisted upon it in his defence [c], but was little regarded by the court. Staunford, the writer upon the pleas of the crown, had the conduct of this prosecution as king's serjeant, and had been strenuous for this act as a member of parliament, though, by the account given of this trial, he appears to have entirely forgotten what he had so strongly contended for: the jury, however, to their great honour, respected the law, (though the court considered it as a dead letter) and acquitted the prisoner.

Between this first opening of the queen's reign, and her marriage the next year, the tone was much changed; for in the pre-

[b] The language of the preamble to a subsidy granted in 37 Hen. VIII. cap. xv. which is printed at length by Rastal, is so singular, that it will best plead my excuse for here inserting it: "We, the people of this realm, have for the most part of us so lived under his majestie's sure protection, and yet so live, out of all fear and danger, as if there were no warre at all, even as the small fishes of the sea, in the most tempestuous and stormie weather, doe lie quietly under the rock, or bank side, and are not moved with the surges of the water, nor stirred out of their quiet place, howsoever the wind bloweth."

[c] State Trials.

amble

amble to the first and second of Philip and Mary, cap. x. it is recited, "That the great mercy and clemency heretofore declared " by the queen's highness, in releasing the penal laws made by " her progenitors, had given occasion to many *traiterous and* " *cankered hearts*, to stir the people to disobedience."

Another statute passed in the present reign, which hath occasioned a very considerable alteration in the common law, with regard to the conviction of criminals [d], by which justices of peace are directed to take their examinations, which they are to reduce into writing *within two days*, and certify them to the next gaol-delivery. It seems to be generally agreed, that before this statute no such examination could have been taken, as it tended to make the prisoner charge himself. I should doubt much, however, whether this was not before practised; but as few could read, and still fewer could write, neither the justice nor his clerk were capable of using this help to their memory, but proved the confession, perhaps, at a great distance of time, and when it was too inaccurate to be depended upon.

I shall not have occasion to observe upon any other statutes [e] of this reign: as for Philip the Second, he was so little acquainted

[d] 2 & 3 Philip and Mary, cap. 8. Montaigne says somewhere, *à tuer les gens il faut une clarté bien lumineuse, et nette.*

[e] There is indeed a statute of 1 & 2 Philip and Mary, which relates to a very singular inconvenience, in Glamorganshire, *of having their lands covered with sea sands*; the law therefore gives powers to the commissioners of sewers to prevent it. The only effectual means, however, of stopping this prejudice to the adjoining fields, is by encouraging the growth of the *juncus acutus capitulis sorghi**, which should not be suffered to be destroyed, as it too often is.

" Si quis spinas, sentes, et dumos in promontorio juxta mare occidentale " crescentes eruerit, extirpaverit, aliove modo exciderit, tam ipse qui de- " lictum hoc admittit quam qui auctoritatem ei accommodavit (citra spem " gratiæ) præter damni reparationem, furti pœnæ obnoxius erit." Leg.

* Ray's Synopsis.

quainted with either our language, or constitution, that he cannot be supposed to have interfered greatly in legislation. With regard to the queen herself, she is known to have been a most unhappy woman, and had so many domestic concerns, that she probably left the direction of her affairs entirely to her ministers. Her intentions upon her accession to the throne seem to have been good, as appears by the statute of *Treasons*; for the latter part of her reign, her *confessors* should chiefly answer.

Fuller mentions a saying of this queen which does her too much honour not to be here inserted, as it is a strong proof of an humane disposition. "It was the charge of Queen Mary
" to Judge Morgan, Chief Justice of the Common Pleas, that,
" notwithstanding the *old error* amongst judges did not admit
" any *advocate* to speak, her majesty being party; yet that her
" highness's pleasure was, that whatsoever could be brought in
" the favour of the subject should be admitted, and heard [*f*]."

Dan. lib. vi. cap. xvii. art. 29. I would not be understood, however, to recommend the making this offence so penal, though it is attended with very bad consequences to those who have lands near a sandy beach.

We have an account, in the Philosophical Transactions, of infinite damage happening at Lakenheath in Norfolk, by a sand-flood, as it is termed, which was stopped at last by some furze hedges, vol. ii. p. 723. Anno 1667. The letter is dated from Downham *Arenarum* in Suffolk.

[*f*] Fuller's Holy State, book iv. c. 7.

STATUTES MADE AT WESTMINSTER,

43 Eliz. Cap. ii. A. D. 1601.

THE 2d chapter of the laws of this session is the well-known statute *with regard to the maintenance of the poor*. I have before observed, that these regulations could not have arisen from the dissolution of the monasteries, as is generally supposed, because sixty years had intervened; and if the poor were at any time distressed by there being no religious houses, that inconvenience must have been most sensibly felt immediately after the Reformation took place. Besides this, though the monasteries were numerous in England, yet it is impossible to suppose they were so equally dispersed, that in all parts of the country the poor could be subsisted by their charity, though ever so extensive and unbounded [g].

The 5th chapter of the fourteenth year of this queen [b] had directed, *that assessments should be made in every parish for the relief of the poor*. This statute is printed at length in Rastal, and con-

[g] *Fynes Morryson* (who wrote about this time) speaks thus of the subsistence of the poor by monasteries, and what was called the hospitality of the gentry: "Neither am I moved with the vulgar opinion preferring
" old times to ours, because it is apparent that the cloysters of monkes
" (who spoiled all, that they might be beneficial to few) and gentlemen's
" houses (who nourished a rabble of servants) lying open to all idle peo-
" ple for meate and drinke, were cause of greater ill than good to the
" commonwealth." Part iii. p. 113.

[b] There are statutes which relate to the poor more early than this fourteenth of Elizabeth, which the reader may see collected together by Dr. Burn, in his *History of the poors laws*, published in 1764, 12mo, who hath likewise published all *the proposed alterations* of this system of laws.

sists of a great number of chapters; it was to continue to the end of that parliament, but was probably suffered to expire from the great severity of this law against those who are styled *vagabonds*. If above the age of fourteen, the strolling beggar is to be whipped, and *burned through the ear with an hot iron the compass of an inch*; for the second offence, he is to suffer death. Such vagabonds were indeed most severely punished during the reign of Henry the Eighth. As soon as they had been whipped, they were to receive a sort of ticket, or permit, from the parish-officer, which if they could not produce, the punishment was to be again inflicted by every justice, into whose hands they might fall [i].

This statute of the fourteenth of Elizabeth was probably occasioned by a printed *Petition against the oppressors of the poor*, which Ames mentions to have been dispersed with considerable industry in the year 1567, and represents to have been written with great spirit [k].

Other causes likewise concurred, as there had been no foreign or civil wars, of any consequence, for near a century preceding this statute, nor was there the present drain of the colonies, by which the mother-country is by many supposed to be so greatly depopulated [l]. The consequence of this must necessarily have been a very great increase of people, which there was not sufficient trade or manufactures to employ. Cock, indeed, who published a pamphlet in 1658, asserts, population was then so much dreaded, that a poor man was not permitted to marry till

[i] See Procl. penes Antiq. Soc. vol. i. p. 82.

[k] History of Printing, p. 272.

[l] Neither do I find that there had been any considerable plague for nearly half a century; and the dissolution of the religious houses might likewise have greatly contributed to the increase of the people. Besides the drain of the colonies, the garrisons of Gibraltar and Portmahon, as well as the regiments stationed in Jamaica and the Leeward islands, are a further cause of depopulation at present.

the age of thirty, nor a poor woman till the age of twenty-five [*m*].

I cannot find in the Journals of the House of Commons, that this most important statute occasioned much debate; and it is also very remarkable, that there is no preamble to it, setting forth the motives of humanity or policy upon which it was proposed. I have likewise lately examined the Journals of the House of Lords, but nothing further appears than the common entries of its being read three times. Notice is indeed taken at the conclusion of that session of parliament, that four lords were appointed to make the usual collection for the poor, which I suppose, upon the passing of this law, many of the peers might think should have been dropped.

It appears by a letter of Mr. Aubrey, the antiquary, that this statute was at first by no means generally carried into execution, and particularly in Wiltshire; nor are the *poors laws* to this day properly executed in some counties of North-Wales, though this act most expressly extends to the principality.

Carew, who wrote his account of Cornwall in the succeeding reign, calls it however *the late most beneficial statute*, and King James, in one of his speeches to Parliament, says, "*look to the houses of correction, remember that in the time of Ch. 3. Popham*" there was not a wandering beggar to be found in all Somersetshire, being his native country [*n*]."

As

[*m*] This must have probably happened during the Protectorate, when marriages were solemnized before justices of the peace, who would not suffer any additional burthen on their estates. Fabian Philips (in a treatise on Capias's, and process of Outlawry) speaks thus of Cock: "Mr. Charles George Cock, who was something of a common lawyer, but nothing at all of a civil, and was advanced in the time of the usurpation to be one of the judges for the probate of Wills." I find likewise by an ordinance of the 19th of July, 1659, that he was appointed, together with Dr. John Godolphin, to be judge of the admiralty.

[*n*] King James's Works, p. 567. There is a tradition that this great

Z z z

lawyer

As the maintenance of the poor is in many parishes attended with such infinite expence to the landholders, it is not to be wondered at, if they are perpetually murmuring against this system of laws. The first answer to which complaint is, that the expence in great measure arises from their own negligence in not following the wise directions of the statute; and particularly, as King James advises, by not *looking to the work-houses*, which is likewise enjoined by two proclamations of Charles the First. By an attention of this kind in the magistrates of Chester, the poors rates have within these few years been reduced from eighteen hundred to three hundred pounds per annum; and the same good consequences might be reasonably expected elsewhere, from the same care in the management of the poor [o].

These lawyer and Chief Justice had been in his younger days a knight of the road. Anthony Wood informs us, that he prevented many notorious thieves and robbers from being pardoned by James the First; adding also, that "he was well acquainted with their ways and courses in his younger days." *Ath. Oxon.* vol. i. p. 293. He was much dreaded by criminals, from the severity with which he passed sentence, if we may believe Dr. Donne the satyrift:

"With guilty conscience let me be worse stung,

"Than with *Popham's* sentence thieves, or *Cook's* tongue,

"Traitors are—"

Letter to Ben Jonson, 6 Jan. 1603. *Works*, p. 197. I should suppose, from the latter part, that Donne had been present at Sir W. Rawleigh's trial, and felt a proper indignation at the treatment which that illustrious criminal received from the attorney-general. It appears by other parts of Donne's Works, that he not only honoured Sir W. Rawleigh, but believed that *Guiana* produced the rich gold mines which he went in search of.

[o] The *Ynca Garcilasso de la Vega* mentions, that there was no beggar to be seen in Peru, which arose from laws of the Yncas obliging children even of five years old to work for their bread; if any Peruvian was incapable of labour, he was supported by the publick. These are exactly the principles

These laws are likewise complained of from their having occasioned many litigations, which objection seems to be now almost entirely removed. The different statutes, though not so clearly penned, perhaps, as they should have been, are now most thoroughly understood; and it is believed there are not at present in the court of king's bench four questions in a year upon the construction of them [p]; to this Dr. Burn's valuable treatise hath likewise much contributed.

The statutes, it is hoped, however, stand upon such wise and humane principles, that they will not easily nor hastily be repealed. The principles are, *that every one capable of working shall be employed; and that he who is incapable, shall be relieved and supported by the parish.* It should seem therefore that a day-labourer, who hath been industrious whilst his health and strength permitted, hath as much right, when weakened by old age or sickness, to a certain support, as the worn-out soldier has to his Chelsea, or seaman to his Greenwich.

principles on which our poor laws are founded, and the authority is nearly irrefragable. The Ynca Garcilasso de la Vega was born eight years after the conquest of Peru by the Spaniards, and continued at his father's house in the neighbourhood of Cusco till he was one and twenty, when he went to Old Spain. He informs the reader (in his Commentaries), that he was always particularly inquisitive with regard to the laws and customs of the native Peruvians from whose Yncas he was descended. Though these were soon altered by the Spanish conquest, yet they continued, during his stay in the country, to be adhered to by the Peruvians; and he positively asserts, that he never saw but one beggar, who was called, by the Spaniards, *Isabel*; this poor woman, being very far advanced in years, and half mad, was permitted by them to intreat alms. *Commentarios Reales*, vol. i. p. 107. Lisboa, 1609.

[p] As for the appeals to the *Quarter Sessions*, this is a necessary and moderate expence to the county; as, without such litigations, no barrister would attend, nor can the county business be properly dispatched without their assistance.

As for that support which may arise from voluntary contributions, it is but a most precarious maintenance; and supposing the gentry of a parish to be of humane dispositions, which is often contradicted by the fact; yet, during minorities, or other necessary absence of the men of property, this uncertain subsistence entirely fails. It may be observed also, that in many parishes of England and Wales there is no inhabitant of any considerable fortune or estate.

Laws have been enacted in many other countries, which have punished the idle beggar, and exhorted the rich to extend their charity to the poor [q]: but it is peculiar to the humanity of England, to have made their support a matter of obligation and necessity on the more wealthy.

As for the punishment of beggars, laws of rigour may be made against them; but what man of common feelings for his fellow-creature can order him, who intreats his alms, to be lashed with stripes, when, perhaps, he may really want the pittance he implores [r]!

[q] None (which I have happened at least to see) are so minute with regard to advising the relief of the poor as those of the Jews collected by Maimonides, in his treatise, *De Jure Pauperis et Peregrini*. I shall instance one or two of these ordinances: "Si pauper accedat quem non cognoscunt, dicatque *esurio*, non inquirant de eo an *fraudulentus sit*, sed statim dabunt ei quo pascatur." "Si pauper à te petat eleemosynam, et nihil sit in manu tuâ quod des ei, placabis eum bonis verbis; prohibitum enim est objurgare pauperem, *vel vocem attollere contra ipsum*, quoniam cor illius fractum est." Prideaux's Translation, p. 71, 101. Oxford, 1679. Nothing can exceed the true and noble spirit of humanity, which appears in every word of the last of these injunctions.

[r] This relates to the laws of other parts of Europe, which punish the beggar with stripes, at the same time that no certain provision is made for him: I have before observed, that a foreigner may still want our alms, as he belongs to no parish which is obliged to support him.

The

The English seem to be confessedly the first nation of Europe in science, arts, and arms; they likewise are possessed of the freest of constitutions, together with the blessings consequential to that freedom. If merits in an individual are sometimes supposed to be rewarded in this world, I do not think it too presumptuous to suppose, that national virtues may likewise meet with their blessings. England hath, to its peculiar honour, not only made their poor free, but hath provided a certain establishment, to prevent their necessities and indigence, when they arise from what the law calls *The act of God*. Are not therefore these beneficent and humane attentions to the miseries of our fellow-creatures, the first of those poor pleas which we are capable of offering, in behalf of our imperfections, to an all-wise and merciful Creator?

This statute of the last year of Queen Elizabeth is the only law which I have had occasion to remark upon: her reign is known to have lasted near half a century; and during this time many acts of parliament passed, which still continue in force.

She was undoubtedly a woman of a strong understanding, and most uncontroulable spirit; the proper exertion of which, upon the apprehension of the Spanish armada, infinitely endeared her to her people, as did the favour and protection shewn to the protestant cause. Upon most other occasions, however, she was the true daughter of Henry the Eighth, and carried the prerogative of the crown to such extent, as, possibly, involved Charles the First in those misfortunes which have rendered his reign the most interesting and melancholy period in history.

I have perused her laws with attention; and, except the statute *to prevent fraudulent conveyances*, I do not find any other of very great importance. The statute of the fourteenth of Elizabeth, which relates to the poor, was a very oppressive law; and as for that of the forty-third, which I have presumed to commend so highly, it can hardly be ascribed to the dictates of her

her humanity [s], as she seems to have doated, from old age or infirmities, in this last year of her reign.

[s] The Journals of the House of Lords furnish us with a most remarkable instance of this queen's hypocrisy, in her reply to an address from both houses of parliament, to put in execution the sentence against Mary, Queen of Scots.

"If I should say unto you, that I mean not to grant your petition, by my faith I should say unto you more than perhaps I mean; and if I should say unto you, that I mean to grant your petition, I should then tell you more than is fit for you to know; and thus I must deliver you an answer answerlesse." Journals, November 25, 1586.

She carried prerogative to such an extent, that Serjeant Hale declared, in the house of commons, "*that all we had was the queen's, and she might take it all when she pleased.*" Petyt, Mss. vol. N. p. 8. B. Nor do we find that this was denied, or resented by any one.

"Demus enim (hoc hodie quoniam responsa tulerunt

"Juridicum, cabalam arcanam qui in pectore servant)

"Major ut ipsa suis sit legibus, atque superstet."

Chaloner de Rep. Angl. l. xi: who wrote this treatise in his voyage to Spain, during the reign of Queen Elizabeth, and consequently describes the doctrine of the lawyers of those times.

STATUTES made secundo, vulgò primo, JACOBI Regis,

A. D. 1604.

THE 8th chapter of the laws of this session is intituled, *An Act to take away the benefit of clergy from some kind of manslaughter*, commonly known by the name of *The stabbing act* [t], and recites, “that stabbing and killing men on the sudden done
“and committed by many inhuman and wicked persons, in the
“time of their rage, drunkenness, hidden displeasure, or other
“passion of the mind, must be restrained, &c.”

This statute is very obscurely penned, and may be pronounced not to have been drawn by any very able crown-lawyer [u]. It is said, in *Keiling*, to have been intended to prevent a notion, which at this time prevailed amongst juries, that *offensive words* might make a stab, in resentment for such injury, *only man-*

[t] There is a proclamation of the 25th of March, and fourteenth of James the First, “against steelets, pocket-daggers, pocket-dagges, and
“pistols, which recites the present statute’s taking away the benefit of
“clergy, in case of stabbing, and the like odious manslaughters.” Every person is forbid to carry such arms, under pain of imprisonment; and the same punishment is to be inflicted on the cutler, who shall make them.

[u] A proviso follows, that the statute shall not extend to any person who shall kill another *se defendendo*, or by misfortune: these cases do not stand in need of any such exception, and cannot possibly come within the penalties of any act of parliament. There is another statute of this reign, which shews very great ignorance of the common-law, though it should seem that no one but a lawyer could have proposed the bill; I mean the 7 James I. cap. xii. which declares, that a tradesman’s books shall not be produced for him; this never could have been allowed to be evidence in any court of law, if no such declaratory statute had passed. I should suppose, that 5 Eliz. cap. vi. (which is printed at length by Rastal) might have occasioned this statute. The title of it is, “An act against such as
“shall sell any ware for apparel *without ready money*.” This law, however, only continued in force till the end of that parliament of Queen Elizabeth.

slaughter ;

slaughter; and the statute (*by its title at least*) determines such a wound in consequence of rage, drunkenness [*w*], hidden displeasure, or other passion of mind, to amount to no greater offence. I should hardly conceive, however, that any jury, or judge of the time, would have held a stab given by a drunken person, or from hidden displeasure, to be any thing else in the eye of the law but a murder; and therefore I cannot suppose that the reason assigned by *Keiling* for the making of this statute was the true one.

I should rather imagine, as is supposed by some, that it arose from the great enmity which subsisted at this time between the *English* and *Scots*, who had followed James the First in shoals on his accession to the crown: the Scots were, in reality, foreigners, and consequently not acquainted with our laws, which this statute is, therefore, declaratory of [*x*].

What is here conjectured seems to receive a confirmation, as stabbing is the great object of this statute, to which the English never were addicted, nor carried about them a proper weapon for: they provoked the Scots, however, by their taunts and reflections, who made use of their *dirks*, which I apprehend to be a kind of stiletto. These quarrels frequently ended both in stabs and duels [*y*]; as Philip the Second had, during his short

[*w*] Drunkenness, by 4 James I. cap. v. is again recited to be the cause of such stabs, as well as other misdemeanors.

[*x*] I have before observed, that, by the *Civil Law*, as well as the *Law of Scotland*, there is no such offence as what is with us termed *Man-slaughter*: the Scots, therefore, might have apprehended, that, if not convicted of *Murder*, they should have been acquitted.

[*y*] The following lines against the Scots were posted every where on the accession of James the First:

“ They beg our lands, our goods, our lives,
 “ They switch our nobles, and lye with our wives,
 “ They pinch our gentry, and send for our benchers,
 “ They *stab* our serjeants, and *pistol* our fencers.”

stay

stay in this country, introduced the Spanish punctilio [z]. Dryden is the first writer, perhaps, who takes notice of the *rude simplicity* o a *Scotch tune*. See his Preface to the Knight's Tale, which latter poetry and music appears by the plays of this time [a].

There

[z] Amongst Sir Philip Sidney's Sonnets, published at the end of his Arcadia, there is one to the tune of the Spanish Song, *Se tu, Sennora, no dueles de mi*; which shews, that it was a favourite and well-known air in England at that time; so that the Spanish language, as well as manners, had been to a certain degree introduced, at least in the neighbourhood of the court. The Spanish cookery seems likewise to have been in estimation:

“And there is a dish for a duke, *olla podrida*.”

One of Fletcher's plays.

As for the Italian style of composition in Music, it was probably first introduced about the year 1616. See Ben Jonson's Works, p. 598. Those, who suppose that David Rizzio gave it an earlier vogue in Scotland, should produce the old Italian tunes that bear the least affinity to those Scotch airs which are generally ascribed to him. If they are to be found any where, it must be in Piedmont, as Rizzio is said to have been a native of that country.

[a] “The blood of our bold youth, which heretofore

“Was spent in honourable action,

“Or to defend, or to enlarge the kingdom,

“Pours out itself with prodigal expence

“Upon our mother's lap, the earth that bred us,

“And bleeds for every trifle.”

Little French Lawyer, Act i. Scene 1.

See also Fletcher's Knight of the Burning Pestle, and many others of his plays; as well as Ben Jonson's Alchemist, in his character of Gastriel, or *The Angry Boy*.

This disposition to duelling was by no means confined to England; for *Mutius* printed an Italian treatise on this subject at Venice, in 1566, for which I shall only give some of the heads of the chapters:

“Of all kinds of lies which may be given.

“Of the lie direct.

“Of the lie hypothetical.

“Of the lie general.

There were many proclamations also during this reign against duelling, in one of which the king declares, "that we do protest
"on our part, that we will never account of them but as of
"cowardes."

Fynes Morrifon, who wrote about this time, fays, "let me
"adde one thinge of corrupt custome in England, that those
"who are not growne menne, never have an opinion of their
"valour till in their youthe they have gained it with some fin-
"gle fighte; which done, they shall ever after live free from
"quarrels [b]." It should seem also from Livy, that duelling
was not so entirely unknown to the ancients as is generally ap-
prehended.

Two cousins, *Corbis* and *Offua*, disputed with regard to a prin-
cipality in *Spain*, and each insisting upon the decision by com-
bat, "quum verbis vellet Scipio fedare iras; negatum, id ambo

"Of the lie special.

"Of the immaterial lie."

But perhaps the strongest proof of the universality of duelling syste-
matically, is to be inferred from Giannones's mentioning, that Paris de
Puteo, a Neopolitan advocate, professed chiefly this branch of the law,
and that he was consulted upon cases of this sort referred to him from all
parts of Europe. Vol. iii. p. 482.

[b] P. 28. A. D. 1668, the king made a declaration in council, that
he would never pardon a criminal convicted of a duel or rencounter,
and ordered the declaration to be entered in the Journals of the House
of Lords. About the same time, the duke of York presented a bill
to prevent duels. Journals of the House of Lords, vol. xii. p. 216,
et. seq. April 6. The king of Sardinia hath declared by one of his
ordinances, that the duellists being his subjects shall be punished equally,
though they have fought out of his territories. See the Laws of Pied-
mont, p. 508. Torino, 1723. Folio. It is said, that duelling is per-
mitted in a particular street of Malta; but they must put up their swords,
when ordered by a woman, a priest, or a knight. Bridone's Letters.

“dicere communibus cognatis; nec alium deorum hominumve,
 “quam martem, se judicem habituros esse [c].”

The 11th chapter is entitled, *An act to restrain all persons from marriage until their former wives, and former husbands be dead*, and makes the offence felony.

The king of Prussia hath the following ill-grounded observation upon this part of the statute. “Il y avoit une loie en Angleterre, qui défendoit la bigamie; un homme fut accusé d’avoir cinq femmes, et comme la loi ne s’expliquoit pas sur ce cas, et qu’on l’interprete littéralement, il fut mis hors de cour, et de procès [d].” This mistake of the *royal writer* probably arose from his having heard that it being made felony by an act of parliament to steal *horses*, it was doubted whether the stealing *one horse only* was within the statute: but though, in the construction of a penal law, the less number may not be included under the greater, yet the reverse never can follow in the construction of any kind of ordinance.

The criminal convicted of this offence is intitled to his benefit of clergy, which many have thought he little deserves. By the law of *Denmark* the crime is capital, as it is also by that of

[c] Livy, l. xxviii. c. xxi. It appears, likewise, by the following Arabian maxim, that duels, or at least trials by combat, are not unusual amongst the Asiatics: “Challenge no man to fight a duel; but, if thou art challenged, thou must answer. If he that challenges be unjust, and thou just, there are hopes, through God’s mercy, thou shalt gain the victory.” Translation of Aleh’s Aphorisms by Wild, from a Ms. in the Bodleian library, marked Hunt, N° 431.

[d] *Raisons d’établir ou d’abroger les loix*, p. 396, ascribed to the king of Prussia: it was published in 1751, as a supplement to the *Memoirs of Brandenburg*. In the thirty-seventh of Henry the Eighth, a private act passed, (with very long recitals) to legitimate the children of Sir Ralph Sadler by the wife of one Matthew a labourer, who had not been heard of for five years, after very diligent enquiries. See Petyt Mss. vol. vi. p. 336.

Spain; which legitimates the children, if the woman is ignorant of the husband's former marriage. In Portugal, however, it should seem, that it is an offence of ecclesiastical connufance, as by the list of criminals, who were punished at the last Auto da Fe in October 1765, there are no less than seven convicts for this crime, who are sentenced to the galleys for five years.

The most ancient law which I can find against this offence, is that made at Venice in the year 1288, the penalties of which however are not very severe, being only restitution of the wife's fortune, and a mulct to the state of the same amount; except in the case of the husband's having induced the second wife to marry him by perjury, when he is to be whipped and banished [e].

[e] See the Venetian Statutes, Leggi Criminali, p. 10. B. Venetiis, 1729.

Twenty-first of JAMES I.

Cap. xxvii. A. D. 1623.

THE title of this statute is, *An act to prevent the destroying and murdering of bastard children.*

This hath by many been considered as a law of severity, because it substitutes presumption of guilt in the room of actual proof against the criminal. I should conceive that it arose from the difficulty of proving the offence against the mother, rather than an intention to make the bare concealment occasioned by a mistaken shame amount to a capital felony. I conclude it must have frequently happened in these prosecutions, that the child being found dead (perhaps in the mother's room), she insisted upon its having been born in that state, of which no witness being able to prove the contrary, she was of course acquitted [f]. If the dead child, however, was discovered with any apparent marks of violence upon it, I should apprehend that this, with other circumstances, might have proved the guilt, even at com-

[f] The preamble alludes to this difficulty in proving the offence.

The experiment, of trying whether the lungs of the dead child will float in water, is generally admitted as evidence in these trials. There is certainly ingenuity in the proof, and arguments very properly deducible from it in a matter of less importance than the life of a criminal. It appears by the Sessions Papers, however, that surgeons have differed in opinion with regard to this point.

Fynes Morryson mentions, that whilst he was at Leipfick, a woman was delivered of a dead child in the great church, and concealed it in the rushes, with which the floors are there strewed, as is the custom in Wales to this day. This child must therefore have been born dead, as its cries otherwise would have alarmed the congregation; but yet a woman, so delivered, in England would be liable to be prosecuted under this statute.

mon law, without the intervention of this statute: and I rather mention this, as I should think, no execution should be permitted, unless the criminal, convicted under this act, would have been guilty of murder by the common law, as she is otherwise to suffer merely from the presumption *arising from the circumstances of concealment*. If this inference of conjecture is by the statute made the offence itself, should it not be encountered by another natural, and most strong presumption in favour of the criminal? Is it not extraordinary therefore to suppose, that the mother, at once forgetting every sensation of parental fondness, should be the wilful author of the death of her new-born child, which by its cries intreats her protection, and the father of which she probably has as great an affection for, as if she had a right to call him by the name of *husband*? And are not children born dead every day? Or may not the mother, in the agonies of child-birth, be the involuntary occasion of the infant's death? As for the circumstance of hiding the body in places proper for its concealment, if the death is not received from the hands of the mother, it is but a natural consequence of endeavouring to continue to bear a good character in her neighbourhood.

It must be admitted, however, that by the ordinances of some other parts of Europe, the same presumption from concealing the approaching birth is made the offence itself, and punished capitally. By the Danish and Swedish law, "*Mulier impudica, quæ ex illegitimo concubitu uterum gestat, nec hoc ante partum aperit, latebras quærens quo furtim enitatur partum, et deinde abscondit, percutiatur securi, et in pegmate comburatur, non attento prætextu, mortuum, vel ante justum terminum editum fuisse [g].*"

"*Fœmina quæ per impudicitiam prægnans fuerit, et partum celaverit, nec usitata remedia quæ sibi & partui salutaria sunt*

[g] Leg. Suec. de Crim. cap. xvi.

"*adhibuerit,*

“ adhibuerit, partum qui non ostenditur, aut exanimis prodiisse
 “ dicitur, consultò interfecisse præsumitur [b].”

The destroying of the infant before birth by procuring an abortion, is a crime which bears a great affinity to this, and is made capital by many laws, though not by that of England [1].

“ Cicero,

[b] Leg. Dan. lib. vi. cap. vi. art 9. Since the first edition, I have had the honour of a communication from a learned judge, whose name it would have been my highest ambition to have been permitted to mention, that there is an edict of Henry the Second of France, in the year 1556, to the same purport : “ Ordonnons que toute femme qui se trouvera avoir
 “ celé, couvert, et occulté tant sa grossesse que son enfantement, sans avoir
 “ déclaré l’un ou l’autre, et avoir pris suffisans témoignages de la vie ou
 “ mort de son enfant lors de l’issue de son ventre, et après se trouve
 “ l’enfant privé du baptême, et de sepulture publique, et acoutumée, soit
 “ telle femme tenue réputée avoir homicidé son enfant, et pour réparation
 “ punie de mort, et du dernier supplice, et de telles rigueurs que le cas le
 “ méritera.” Institutes Crim. par Vouglas, Paris, 1757, 4to. p. 532. I have likewise happened to see a long edict published by the king of Prussia at Berlin, in 1765, with regard to the murder of bastard children by their mothers, by which it should seem that he is endeavouring to repair the depopulation of his country by the last war. The regulations are very minute and particular, and I shall only mention the conclusion :
 “ Enfin, pour engager d’autant mieux les personnes tombées en faute à
 “ déclarer librement leurs grossesses, selon le teneur du présent edict, et
 “ pour prévenir par là de plus grands maux encore : Nous levons, et
 “ abolissons en meme tems, toutes les peines de quelque ordre qu’elles
 “ soient, qui ont eu lieu jusqu’ici, contre celles dont il s’agit ; les déclarons
 “ à l’abri de tout chatiment, *et voulons qu’elles ne soient pas même exposées*
 “ *au moindre reproche, ou à la plus légère flétrissure pour la faute commise.*”

[i] It should seem however to have been a capital offence in the time of Bracton : “ Si fit aliquis qui mulierem prægnantem percusserit, vel ei
 “ venenum dederit, per quod feceret abortivum ; si puerperium jam forma-
 “ tum, vel animatum fuerit, facit homicidium.” Possibly however Bracton only lays this down from the Roman law (which is not uncommon with him), by which, according to a citation from the Digests, it is made capital. It is rather extraordinary, that the striking a pregnant woman

who

“Cicero, in oratione pro Cluentio, scripsit Milesiam quandam mulierem, cum esset in Asiâ, quod ab hæredibus secundis, per cuniâ acceptâ *partum abegisset, rei capitalis esse damnatam* [k];” and it is likewise asserted, in the comment on the *Coustume reformée de Normandie*, that this crime is punished with death in most parts of Europe [l].

James the First affected to be styled and thought the *Solomon* of his age [m]; he therefore had a particular attention to the laws which were enacted during his reign.

It who dies afterwards in childbed, should have been supposed to be so common an offence as to constitute one of the only three crimes, which the great barons in France had the connusance of within their lordships.

“*Bers* [a Baron] si à en se terre le murtre, le rat, et l’encis. *Rat* si est feme efforcie. *Encis* si est feme enceinte quand l’on la ferit, et elle meurt de l’enfant, &c.”

An ordinance of St. Louis, in the year 1270, cited by Brussel, t. ii. p. 895.

[k] Dig. de partu abacto.

[l] Vol. i. p. 35. Collier, in his Ecclesiastical History, mentions a canon, in the time of Edgar, by which a woman who murdered her child, or procured abortion, was obliged to do penance by a ten years fast. Vol. i. p. 188.

Struys gives us an account of a most extraordinary custom, which seems to be peculiar to the inhabitants of the island of Madagascar. If the mother is ill during her pregnancy, the child is destroyed as soon as it is born. *Voyages de Struys*, p. 21. Amsterdam, 1681.

[m] Lord Verulam mentions this king’s having said, in a great cause of judicature, “That sovereigns ruled by their laws, as God did by the laws of nature; and ought as rarely to put in use their supreme prerogative as God does his power of working miracles.” If the comparison of a finite and infinite Being is not here thought too presumptuous, perhaps no more noble thought was ever delivered by either king or magistrate. *Bacon de Augm. Scient.* vol. i. p. 97. edit. of 1765, 4^{to}.

To this I may add, that Sully, who was ambassador from France to James the First, and is supposed to be the greatest statesman, as well as minister

In his youth, when he went to Denmark in order to bring back his queen, it appears, by his own works, that he spent more time in the Danish courts of Justice [n], than in attending upon his destined consort.

After this, when he became king of England, he had frequent conferences with Sir Edward Coke, as also other eminent judges, on the subject of the English law, and wanted much to preside in the King's Bench: though Sir Edward Coke prevented this for the most part, yet, if we may believe Rushworth, he actually did attend the cause of Sir *Thomas Lake*, and Lady *Exeter* [o].

Besides this, we find in each of his speeches in parliament, which are known to be his own compositions, that he dwells much upon the laws which he would recommend to their consideration; he therefore not only attended to the statutes of his minister of that century, speaks highly of the talents and abilities of this king.

See also a warrant very ably drawn, which is printed from the original in the king's own hand and very peculiar orthography, which he had brought with him from Scotland. *State Trials*, vol. vii. p. 67.

This king is also much ridiculed for having written a treatise on witchcraft; but it should be at the same time remembered, that Lord Chief Justice *Hale*, when the world was more enlightened, permitted the execution of criminals for this offence.

[n] The Danish law was at this time comprehended in one short code; it is not improbable therefore that he might have perused it with attention; it is remarkable also that three of the statutes of this reign for the punishment of criminals agree exactly with the Danish ordinances on the same head. His desire of being instructed in the English Law, and having had conferences thereon, is recited in the preamble to a patent by which he appointed two law reporters in the year 1617, with a salary of 100 l. *per ann.* Rymer, vol. vii. part iii. p. 29.

[o] Rushw. vol. i. p. 473. This is likewise mentioned by Hobbes, in his Dialogue between a Lawyer and a Philosopher. Works, p. 607, ed. 1750.

reign, but, in all probability, many of them might take their first rise from his commands to his ministers. Some laws passed, which deserve much to be enforced [*p*]; nor do I find any one which hath the least tendency to extend the prerogative, or abridge the liberties and rights of his subjects; a negative merit in a king, which should weigh in the scale, perhaps, against many positive ones. It is at present a sort of fashion to suppose that this king, because he was a pedant, had no real understanding, or learning: now pedantry is only comparative; and Mr. Hume very fairly sets the speeches of the king in competition with those of the speaker in every session of parliament, after which he justly gives the preference to those of the sovereign [*q*]. The same

[*p*] 2 James I. cap. xxiii. xxv. xxxi. 3 James I. cap. xviii. which is the act for bringing the New River to the city of London; and the king himself had contributed liberally to this undertaking. 4 James I. cap. i. also many acts to prevent the increase of popery; and, lastly, the twenty-first of James the First, ch. iii. to restrain monopolies*, which the preamble recites the king himself to have published a treatise full of zeal and warmth against, in order to suppress this growing evil.

[*q*] In the proceedings of the House of Commons, for the year 1620 (published from a manuscript in the library of Queen's College, Oxford), the king's speech for that year to his parliament is followed by that of Lord Verulam, which seems to be more vitious in the eloquence, if it may deserve such a name, than that of the king's. James thought these harangues were so much to his credit, that they were translated into Latin by Montague, bishop of Salisbury, in order to spread his fame as an orator over Europe. Petyt Mss. vol. Q. p. 153.

It appears, by the same Collection of Mss. that the king sent a present

* The French lawyers use the word *Monopole* in a very extraordinary sense: "La treizieme maniere si est crime de *Monopole*, si comme quand aucun s'efforce de faire en un pais, ou ville, assemblée des gens, disant, nous devons être ainsi traitez, et menez, et devons de tel mestier avoir telle franchise, et tel gagnage, ny ne devons pour ce plus ouvrir, et laisser ouvrir a telle heure, &c. qui chet en tel mesfait, il court en crime capital de conspiration." Bouteiller, Somme Rural, p. 172. Paris, 1603.

same observation may be made, equally to the king's advantage, between the bishop who writes the prefatory discourse to the royal speeches, and the works themselves, if it is not supposed that the prelate, acting like a good courtier, underwrote himself. Another contemporary bishop makes an apology in the preface to a Welsh version of the Bible, for preferring the Deity to his majesty, after which we cannot be surprized at any instance of adulation.

What hath greatly tended to this king's character being considered in so low a light, is the notion which prevails, that he had not any martial spirit. I cannot say indeed that I have met with any proofs of his being a man of resolution; but as for his declining the *Palatinate* war, which he is generally so much condemned for, he seems to deserve the highest praises and commendation from a nation of Islanders. He by this prudent caution prevented our being involved in a most unnecessary expence, which he would have incurred, however, without the least danger to himself in person, and consequently cannot,

of this book to all the northern princes of Europe, who were of the Protestant persuasion. It is not unentertaining to observe, in their answers of compliment and thanks for the present, how each endeavours to insinuate that he hath read the treatise, without positively asserting it. Petyt Mss. vol. liv, p. 342, et seq. This book of the king's was much relied upon by Wraynham in his defence, for having petitioned his majesty to re-hear a decree of Lord Verulam. Amongst other passages the following was read by the defendant to the court of Star-chamber: "If any were wronged, their complaint should have come to me; none of you but will confess you have a king of a reasonable understandinge." State Trials, vol. vii. p. 105.

Sir A. Weldon (in his Court and Character of James the First) speaks thus of him: "He loved good laws, and had made many in his time, and in his first parliament gave way to that *Nullum tempus*, &c. (meaning the statute of limitations), which was most beneficial to the subjects in respect of their quiets." P. 185.

from thence, merit the imputation of either pusillanimity or cowardice [r].

[r] I cannot however go so far in commendation of the virtues of this king, as Mr. Thomas Ross, in his dedication to James the First, "Non sum nescius, princeps omnium quotquot sunt, fuerunt, aut erunt, nisi fallunt fata, longè maxime, et (*velint nolint*) omnium optime." De Jacobi virtutibus enarratio, 1608, Londini.



APPENDIX

Sir A. Watson (in his Court and Character of James the First) speaks of his love of good laws, and had made many in his time, and in his first parliament gave way to that William's (mean- ing the statute of limitations), which was most beneficial to the subjects in respect of their quiet. P. 187.

A P P E N D I X.

THE reformation of the law hath generally been an object, and often the chief glory, of the greatest reigns; it is not, therefore, to be doubted, but that under the present auspicious one, which hath begun by an act recommended from the throne itself [a], to perpetuate to this nation the most pure administration of justice, this great point will be, sooner or later, attended to.

It is not, however, proposed by the term *reformation*, that there should be a new arrangement and institute of the whole body of the law, as in the time of *Justinian*, or a *Code Frederique*, which is not to be attempted in this country, where every alteration, or authoritative promulgation, must have the sanction of parliament; nor, were it practicable, would the proposer presume to make any innovation with regard to what is founded in the deepest wisdom.

They who ridicule the law of England can never have been witnesses of that constant, deliberate, and upright administration of justice, which hath prevailed in the different courts of this kingdom since the Revolution, upon the most rational principles.

Will it be said, that the law is uncertain, where there is hardly a difference of opinion between the judges of the courts at Westminster upon the variety of points that come before them from

[a] 1 Geo. III. cap. xxiii.

year to year? And how few writs of error are brought from their judgements, but for the purpose of delay?

If this uncertainty is not to be objected to the courts of common law, as little can it be imputed to those of equity: nearly twenty years of well-considered decrees, made by the same most consummate lawyer without reversal, have now established so clear, consistent, and beneficial a system of equity, that ignorance only can reproach it with being *jus vagum aut incognitum*.

As an honest and impartial decision hath invariably been the object of every court of justice, since the Revolution, certainty in the law must be a necessary consequence [b]. It is in other countries, where judges have decided (occasionally at least) from self-interested motives, that fluctuation of opinions hath arisen; but in this island, the common-place epigram, or satire upon bribing a judge, would lose its sting; as even he against whom the cause is decided, though he may disapprove the determination, yet never even suspects the integrity of the magistrate.

The law of England, however, is said to be attended with delays: it is difficult to answer a charge of so general a nature; but to which of the superior courts can this be objected? It is believed that there are no arrears of business in any one of them; on the contrary in the King's Bench, where some years ago this reproach might have been made with propriety, no suitor ever waits beyond the ensuing term, when he receives a decision not only satisfactory to the disputant parties, but which, from its clearness and irresistible force of argument, must remain a kind of law land-mark to the latest posterity.

[b] It is remarkable, in the Reports of cases determined soon after the Revolution, that the judges continually differed in opinion: the reason seems obvious, that the law was not then fixed by a long course of rational and unbiassed decisions.

But

But Chancery causes have remained undecided for twenty years and upwards. This must be admitted to have sometimes happened, but cannot be prevented by any new rules of court, or alteration of the practice: when causes have been so long depending, it generally has been occasioned by the frequent deaths of parties to the suit; and natural justice requires, that they, who become interested in such an event, should have an opportunity of defending their right.

When a cause is once brought to a hearing, nothing can be more expeditious; the Lord Chancellor, or Master of the Rolls, sits five or six hours in court most days of the year, and nineteen suits out of twenty receive an immediate determination [c]; the court of Exchequer, likewise assists, in dispatching this branch of business.

Thus much hath been said to obviate the objection, that, if any alteration, or new arrangement of the law is designed, it should be of the most extensive nature.

The reformation of the Code of statutes, however, so far as to repeal obsolete [d], and sometimes dangerous laws, as well as the

[c] Besides this, what are generally called delays are absolutely essential to the liberties of a free country.

“Quoi qu'en disent le plus part de nos voyageurs, qui pour avoir vu
 “en passant trois crocheteurs, ou trois autres gens de la lie du peuple, à
 “l'entour d'un Kady, etre renvoyez vite, s'en viennent ici crier, *O la belle*
 “*et la courte justice! O les honnetes gens, que sont tous ces justiciers là, au*
 “*prix des noires!* ne prenant pas guide, que si l'un de ces miserables qui
 “seroit dans le tort, avoit un couple d'écus, pour corrompre le Kady ou
 “ses ecrivains, et autant pour acheter deux faux temoins, il pourroit
 “gagner son procès.” *Bernier's Travels*, vol. i. p. 319.

It is to be hoped, however, that justice is better administered by the Cadis in the kingdom of Algiers, as Dr. Shaw informs us that they are sent to Grand Cairo, in order to study the Roman law, which hath been translated into Arabick.

[d] It may be said, that an obsolete statute, from which no bad consequences

the reducing the different acts of parliament which relate to the same subject, into one consistent statute, would be a salutary, nay is almost become a necessary, work [e].

Many quenees have arisen, should not be repealed, as it may occasionally be of use to the historian and the lawyer. This objection would prove, that most of the acts contained in Rastal should have continued in force; and a sufficient number of that edition of the statutes remains for the above purposes: besides, every useless obsolete law, in some measure, takes away from the reverence which is due to those that are more frequently enforced. Lord Verulam therefore compares the intermixing obsolete statutes, in the same Code with those which are often executed, to *Mezentius's* fastening dead bodies to the living, "*adeo ut leges vivæ, in complexu mortuorum, perimantur.*"

[e] This is strongly recommended by the preamble to 5 Eliz. cap. iv.

It is part also of the claim of the house of commons, when James the First was to have given up the court of wards, for a consideration of 200,000 *l. per annum*. "That his majesty be petitioned to appoint some "to make a diligent survey of all the penal statutes of this realm, to the "end that such as are *obsolete* and unprofitable may be repealed, and that, "for the better ease and certainty of the subject, all such as are profitable, "concerning one matter, may be reduced into one statute." Journals of the House of Lords, July 23, 1610, 8 Jam. I.

It appears by Lord Verulam's Works, that, by order of James the First, Lord Chief Justice Hobart, Mr. Serjeant Finch, Mr. Heneage Finch, Mr. Noye, Mr. Hackwell, and Lord Verulam himself, were employed for a considerable time in this very undertaking, and that they had made some progress in it. I the rather mention these great names, that no lawyer may think such a complement derogatory, or below his dignity. See also the Preface to Lord Coke's 4th Rep. where he mentions having received such orders from James the First, and which he highly extols.

Mr. *Locke's* 79th article of the Carolina laws is in the following words:

"To avoid multiplicity of laws, which by degrees always change the "right foundations of the original government, all acts of parliament "whatsoever shall, at the end of a hundred years after their enacting, "respectively cease, and determine of themselves without any repeal."

Works, vol. iii. p. 674.

Many acts of parliament fortunately, for the most part, lie buried in the Statute Book, till the spleen of individuals calls them forth, to the disgrace of the law, and the distress of the person prosecuted. To prove the oppression and vexation which may arise from them, three or four out of an immense number need only be mentioned. It is felony [*f*] by 8 Eliz. cap. iii. to carry live sheep out of the kingdom; and there is no exception of the stock, which is necessary for the fresh provisions of a ship's company: upon such an indictment, indeed, both judge and jury would probably unite in preventing a conviction, but the criminal may be obnoxious to the jury; and, at all events, such a prosecution should not be suffered.

There are, more particularly, many acts during the reign of Henry the Eighth, which call for an immediate repeal, as they then began to make regulations relative to trade and agriculture, without understanding the true principles by which they may be promoted: by the 25th of that king, cap. xiii. for example, it is made penal to keep above 2000 sheep. The greatest part of half the Welsh counties, and perhaps some of the English, is fit for nothing else, nor can profitably be converted to arable; and yet there was an indictment in *Cardiganshire* within these twelve years upon this obsolete and injudicious statute [*g*]. "To compell tillage, says the great Lord Verulam, is to strive "with nature and utility [*b*]."

An opportunity cannot be here omitted of mentioning, that a judicious collection of proposed and rejected acts would have its use.

[*f*] It is only felony, indeed, for the second offence; but the first is punished with imprisonment, and loss of the left hand.

[*g*] By 2 and 3 of Philip and Mary, ch. iii. for every six score sheep, a milch cow is to be kept, and a calf to be reared, every year. Many a land-holder or farmer may subject himself to such a prosecution, and few of them have ever heard of such a parliamentary regulation.

[*b*] Life of Henry the Seventh, p. 73.

It is submitted, that the laws of Queen Elizabeth, which enforce the going to church under penalties (our present rational religion does not want the aid of such regulations), should be repealed. A son prosecuted his mother upon these acts within these fourteen years [i] ; and it may almost be said, that no man of business can go through life, without subjecting himself to many prosecutions, when, at the same time, he was not conscious of perhaps having offended against any law whatsoever [k].

Sir

[i] Mr. Locke, speaking of these acts of Queen Elizabeth, says, "there are examples (in the memory of hundreds now living) of every one of those laws being put in execution." Works, vol. ii. p. 383. ed. 1759.

I have likewise been informed, that there was, not many years ago, an indictment at the quarter sessions in Somersetshire, on 6 Edw. VI. cap. iv. which punishes striking in a church-yard with the loss of ears : this statute, at the time it was enacted, was intended to prevent dangerous riots between the papists and protestants, upon the first establishment of the Reformation.

The inconvenience and vexation of these prosecutions was severely felt in the reign of James the First, as Beaumont, in one of his plays, speaking of a Justice of Peace, says,

"Take away his statutes, the devil hath possess him in the likeness of penal laws."

Dr. Donne also, a contemporary writer, seems to have had the dread of these statutes continually before him :

"But my words none draws

"Within the vast reach of the huge statutes jaws." Satyr 2.

And again,

"And methought I saw

"One of our giant statutes ope his jaw

"To suck me in." Sat. 4.

It appears by a state of the accounts which were annually drawn up by the Society for the Reformation of Manners, that, in the year 1714, no less than 1152 persons were prosecuted for lewd and disorderly practices, 1066 for exercising their trades on a Sunday, besides three or four hundred other prosecutions under different heads. See also Stowe, B. v. p. 32. ed. 1720.

[k] It may be proper likewise to mention some instances of a statute
most

Sir *William Young*, many years ago, moved for a committee of the House of Commons for this very purpose, of which he was himself the chairman: it is believed, however, that nothing material was done, or resolved upon.

This was possibly owing to its being a work of time and deliberation, which the flux body of a committee [l], sitting from year to year, is not at all calculated for; the assistance of lawyers was likewise probably wanting: those barristers, who are members of the House of Commons, have generally too much business in their profession to spare time for such an attendance; and without such assistance the committee could not well proceed.

As this obstacle must for ever continue to this great work being done by a committee of parliament solely, it is proposed that two or more serjeants or barristers should be appointed, who, from year to year, might make a report to the privy council, as likewise to the lord chancellor, the master of the rolls, and the twelve judges, of a certain number of statutes [m], which should

most absurdly placed, where no one could expect to find such a law: a most material alteration, in the statute of *Distributions*, is inserted in the 1 Jac. II. c. xvii. entituled, *An Act for the reviving and continuing the several acts therein mentioned*: and by 20 Geo. II. cap. xlii. for *explaining the Window-Tax act*, there is a clause, that all laws, which were then in force, or which should hereafter be enacted, are to extend to Wales and Berwick, though not particularly mentioned.

[l] See an account of such a committee, Deb. H. C. 1620, vol. i. p. 38. By 27 Hen. VIII. cap. xv. (which statute is printed at length by Raftal) the king is empowered to appoint commissioners for the reformation of the canon law.

[m] If too many are inserted in the report, they will not be properly considered; and Trebonianus is much condemned by the writers on the Civil Law, who, when Justinian had allowed him and his assistants ten years for compiling the Pandects, from a too great desire of dispatch, published the collection in three. Duck de Auth. Jur. Civ.

either

either be repealed, or reduced into one consistent act. It may be proper also, that they should at the same time transmit such statutes as they may propose to substitute in the room of those which seem liable to objection. There will then be the whole vacation for the consideration of such intended alterations, and, if they should be approved of, they might pass into laws the subsequent session of parliament.

The good consequences of such a reformation need not be dwelt upon, as the Statute-Book would be reduced to half its present size, and the subject better know the law he is to be governed by. It is indeed much to be feared that the complaint, which Sir *George Mackenzie* makes, in the introduction to his *Observations upon the Scotch acts of parliament*, may not be applicable to our own. After having mentioned the *ardent desire* of the legislature for the amending their laws, he says, it was one of his chief inducements for writing on this subject, that, though a lawyer, he found difficulty in understanding the statutes, which were the "*pillars of the law.*"



I N D E X

OF THE

P R I N C I P A L M A T T E R S.

* * The *Italic* Letters [in Crotchets] refer to the Notes.

- A.
ABjuration of the Realm, p. 125.
Acatour. Signification of, p. 289.
Act of Parliament. Distinction between it and an Ordinance, p. 46, [b].
Additions. Statute of, p. 372. 381.
Admiral. Court of, p. 333. A rank sometimes applied to land officers, *ibid.* [i].
Adulterium. Signification of, p. 70, [b].
Adultery. How punished during the protectorate, p. 143.
Advocates. Confined in point of time, in their speeches, by the Romans, p. 68, [e]. Their dependence anciently, p. 375. Whether ennobled in other countries, *ibid.* Gains of, in the time of Hen. VIII, p. 508.
Alchemy. Studied and encouraged in England, p. 416, [e].
Aldermen of London. Insist upon precedence to knights, 153, *.
Algerines. Adhere to treaties as well as some European powers, p. 366.
- Alice Perrers*. Her ascendancy over Edward III, p. 294.
Alienations. Mistake of Lord Bolingbroke with regard to the Statute of, p. 448.
Alms to beggars forbid by 23 Edw. III, p. 265.
Amber. A head of the Prussian Law, p. 204.
Amendments (statutes of). Should be extended to criminal proceedings, p. 247.
Anatomy of the Bodies of Convicts. A practice of the ancients, p. 447, [i].
Apparel. Stat. 22d Edw. IV, with regard to, p. 424.
Appeals. Anciently used, and whence derived, p. 27.
Apportum. Signification of, p. 190, [g].
Apprentice de la ley. The contraction which may have occasioned this term, p. 345, [i].
Appropriation Act. First instance of, p. 414.
Approvers. Why we hear no more of them, p. 180.

- Archers.* Encouraged by Edward IV, p. 425.
- Archery.* Whence introduced, Statute with regard to, p. 424, et seq.
- Argentum Dei.* Signification of, and formerly paid in England, p. 204.
- Armies.* How raised anciently, p. 420, [n]. How subsisted, p. 146.
- Arms of England.* Change of by Edward III. p. 254, [l].
- Articles of War.* By Henry V, p. 420, [m].
- Assach.* Signification of, p. 382.
- Assart.* Signification of, p. 36, [e].
- Assent.* Form of the king's giving to a law, p. 62, [s].
- Affise of Novel Disseisin.* Whence so called, p. 135.
- Affises de Jerusalem.* Account of this collection of Laws, p. 494, †.
- Attaint.* The consequence of this proceeding being disused, p. 100, et seq. Manner of trial in, p. 459, [t].
- Attestation.* Ancient form of by the kings of England, p. 30. Inconvenience of more than one witness in, p. 198, [t].
- Attornies in Norfolk.* Confined to the number of six, to be examined before admitted, p. 414, [c].
- Aubaine.* French right of, p. 117, [u].
- Aver.* Signification of, p. 13, [e].
- Avoir de pois.* Signification of, p. 232.
- Aurum Regina.* Anciently collected, p. 204, [g]. Why disused, *ibid.*
- B.
- Badger.* Supposed etymology of this word, as used in the statutes against forestallers, p. 214, [t].
- Bail.* The English and other Laws with regard to, p. 434.
- Baile.* Proper signification of the word, p. 434.
- Bakers.* Trade of, subject to severe laws, p. 53, 211.
- Banishment.* Singular instance of, p. 213.
- Barat.* Signification of, p. 216, [w].
- Barbers.* Separation of from Surgeons, p. 475.
- Bards.* Laws with relation to, p. 363, et seq.
- Bastard Children.* Act against destroying of, considered, p. 549. Laws of Sweden and Denmark with regard to, p. 550.
- Battle.* Trial by. When disused, p. 227, 327.
- Beacons.* Where to be erected anciently, upon apprehensions of an invasion, p. 369, [q].
- Beaumanoir.* The most ancient author in the French Law, p. 494. Account of his Costumes de Beauvoisis, *ibid.*
- Bedford.* County of, in the 23 Edw. I. sent only three Members, including the Boroughs, p. 283, [u].
- Bees.* A head of the Welsh and Norman laws, p. 42.
- Benevolence.* Speech of the Duke of Buckingham and Cardinal Wolsey, with regard to, p. 433.
- Bercator.* Signification of, p. 217.
- Bible.* First translation of, and whether it hath fixed our language, p. 512.
- Bigamy,* as vulgarly styled, Statute of, p. 106. Statute with regard to what is more properly termed so, p. 527. Ill-founded observation of the K. of Prussia thereon, *ibid.*

Bishops.

- Bishops.* Whether to be summoned to the trial of peers, p. 32, [k].
- Black Prince.* Imposes a heavy tax on the Gascoons, p. 281. Why so called, p. 347.
- Bordeaux.* Signification of, p. 220, [c].
- Boroughs.* King's prerogative of creating them, with the franchise of sending members to parliament, p. 182.
- Branding.* Bad consequences of this punishment, p. 444.
- Breach of Prison.* Supposed occasion of the law with regard to, p. 192.
- Breach of Trust.* Whether it may not amount to a larceny, p. 479.
- Brewery.* Trade of, formerly carried on by women in this country, p. 54.
- Brugstol.* Signification of, p. 233, [k].
- Buckingham, Duke of.* Solicits Lord Bacon in causes, p. 23, [l].
- C.
- Cade and Tyler.* Irregular proceedings with regard to their followers, p. 322.
- Calais.* Expence of its fortifications whilst it belonged to England, p. 383.
- Cantred.* Signification of, p. 125, [b].
- Capellus.* Signification of, p. 151.
- Capitularium.* Signification of, p. 3, [l].
- Castles.* Plans of, brought over by the Crusaders, p. 134, [y]. Occasion of building them in Wales by Edward I, p. 120, [b].
- Chambellage.* A head of the ancient French Law, p. 149, [f].
- Champerty.* Frequently practised anciently, p. 186.
- Chancery and Chancellor,* p. 404, et seq.
- Children.* Exposed by the Ancients and Chinese, p. 129.
- Childwife.* Signification of, p. 238, [k].
- Church Yard.* Why yew trees planted in, p. 191.
- Cincia Lew.* Purport of, p. 415, [d].
- Cinque Ports.* Their consequence, p. 186, [b].
- Circuits,* ancient division of, p. 226. Lord Clarendon's expression is, such a judge rode his circuit. See Life.—The same expression is used by this same author with regard to the King's riding to meet his parliament.
- Civil Law,* p. 50. Some part of the English Law borrowed from it, p. 88, [r]. More voluminous than the English, p. 493, [c]. Is too refined, *ibid.*
- Clarke, the Rev. Mr.* Of opinion that gold was coined in England more early than is commonly supposed, p. 483, [l].
- Clergy.* Why not judges in cases of blood, p. 178.
- Clergy,* formerly rapacious, p. 29. Privilege of, p. 441, et seq.
- Clerk of the Market.* His extortions, p. 453.
- Climates of Europe.* Have become more mild, p. 401.
- Coin.* Ancient state of, p. 170. offences against, p. 273. Abuse of by Hen. VIII, p. 274, [c].
- Coke, Sir Edward.* Supposed mistakes of, p. 195, 200.
- Collistrigium.* Signification of, p. 55.
- Colonies.* Their dependence on the mother country asserted by an ordinance of 1630, p. 166.

- Common Law.* Often weakened by what is recited in a Statute, p. 394. 411.
- Common Recovery.* Absurd fiction of, p. 131.
- Commote.* Signification of, p. 125, [b].
- Compass and Imagine.* Import of, p. 270. 275, [f].
- Compurgators.* The numbers of them accounted for, p. 383.
- Confessor.* The Kings of England formerly applied to the Pope for liberty to choose, p. 188, [b].
- Congé d'eslire.* Statute with regard to, p. 278.
- Constable and Marshal.* Incroachments of, p. 325. Their Courts why now disused, *ibid.*
- Contenementum.* Signification of, p. 12.
- Copyholds.* Unknown in Ireland or North-Wales, p. 302.
- Coran.* Citation from, with regard to murder, p. 465, [i].
- Coronation Oath.* Ancient form of, p. 229, [w].
- Coroner.* Lord Bacon's etymology of the word considered, p. 105. Duty of, *ibid.* and p. 125.
- Corporations.* Some inconvenient privileges of, p. 324, [l].
- Corody.* Form of a particular grant of, p. 80, [y].
- Cover feu.* An ancient regulation in most parts of Europe, p. 154, [b].
- County.* Anciently but one member for each, p. 283, [u].
- Courageous.* Ancient signification of this word, p. 260.
- Creancier.* Why this term was applied by the French to the English, p. 234, [e].
- Crimes.* Unknown at present, anciently frequent, p. 156.
- Criminals.* Formerly tried by two judges, p. 178. Should perhaps when convicted be subject to Medical Experiments, p. 447.
- Crowth.* An ancient Welsh instrument, p. 364, [e].
- Culprit.* Supposed etymology of, p. 419, [l].
- Curtesy of England.* Borrowed from the Norman Law, p. 495, [c].
- Customs.* Sinécures in, very ancient, p. 349.
- Cymortha.* Signification of, p. 360.
- Cypriots.* Law of, with regard to shipwrecks, p. 349.

D.

- Damoiseaux.* Signification of, p. 193, [l].
- Dance of Death.* Character of a perjured juryman in it, p. 458.
- Deceits in Manufactures.* Anciently complained of, p. 417.
- Defamation.* Laws against, p. 315.
- Derefter.* Signification of, p. 328.
- Defuetude.* A Statute may be in, by the Scotch law, p. 45.
- Dirationare.* Signification of, p. 21, [d].
- Dissolution of the Monasteries.* Occasion of increase of Law-suits, p. 507. Though not of distressing the poor, p. 508.
- Distresses.* Oppression of the sheriff in levying them, p. 12. 14. 66.
- Divorce.* Proposed Bill with regard to, in 31 Hen. VIII, p. 505.
- Dock Yards.* Proposal to confine convicts in, p. 445.
- Domesday.* Supposed etymology of, p. 299, [m].

Dozeins.

- Dózeins.* Signification of, p. 208.
- Duels.* Not entirely unknown to the ancients, p. 546.
- Du Moulin.* Character of this author, p. 12, [d].
- E.
- Edward I.* } Their characters, as *Legislators*, and the end of
Edward II. } the Statutes of their
Edward III. } respective reigns.
Edward IV. }
Edward VI. }
- Edward IV.* Tried criminals himself in person, p. 429.
- Ejectionment.* Fictitious proceeding in, censured, p. 133, [y].
- Elizabeth, Queen.* Her character, as a *Legislatrix*, at the end of the observations on the Statutes of her reign.
- English.* Formerly more irascible than at present, p. 153, 156, [g].
- Distrust their negotiators, p. 258.
- And guilty of more crimes formerly than at present, p. 261.
- 371.
- English Law.* Citation from a French writer with regard to, p. 51, [l].
- Entails.* Inconveniencies of, p. 128, et seq.
- Equity, Court of.* Its origin, and judges anciently not lawyers, p. 403, et seq. Whence this court derived in the great Sessions for Wales, p. 517.
- Erick.* Laws of, held in great veneration by the Swedes, p. 9, [t].
- Errors, vulgar.* With regard to what is supposed to be law, p. 474, [z].
- Escuage or Scutage.* Signification of, p. 342.
- Esquire.* How defined, p. 288, [g].
- What the rank of formerly, p. 371.
- Essoins.* Delay of, p. 200.
- Exchequer, Barons of.* Were not anciently considered as *Judges*, p. 136, et seq. Formerly rather revenue than judicial Officers, p. 249.
- Executioner.* Highly odious in some countries, p. 275, [e].
- Executions.* For the greatest offences may be too horrid, p. 274. Supposed number of, in the time of Hen. VIII. p. 521.
- Experiment.* Of trying whether the lungs will float, not to be depended upon, p. 549, [f].
- Experiments, Medical.* Should be tried on convicts, p. 447.
- Exportation of Corn.* Statute with regard to, p. 402.
- Extender of the Crown.* Duty of this officer, p. 103, [w].
- Eyre.* Sessions of the Justice in Eyre, why disused, p. 43.
- F.
- Fee.* Of the Chamberlain, on Homage, p. 145. Judges servants, *ibid.* Of a Roman advocate, p. 415, [b]. Of a gaoler, p. 163.
- Felony.* Signification of, p. 307, [k].
- Female.* Included by the word *male* in a law, p. 123, [p].
- Feudal Law.* Unknown to Sir *Edward Coke*, p. 123, [e].
- Fictions in Law.* Censured, p. 132. 402.
- Fiddler.* Ancient signification of, p. 363, [e].
- Fish.* Laws with regard to, p. 145. 284.
- Floating of Wood.* A head of the German Law, p. 16.
- Forest.* Incroachments in the law of, p. 35.
- Forestallers.*

- Forestallers.* Absurdity of the laws against, p. 214.
- Forgery.* How punished anciently, p. 380.
- Fornication.* Punishment of, p. 143.
- Foster, Justice.* Some of his opinions considered, p. 32, [k]. 56, [d]. 524.
- Fouage.* Tax of, p. 281, [s].
- France.* The title of the Crown of England to that country given up by Hen. VIII, p. 252, [i].
- French and English Nations.* Formerly no animosity between, but in time of actual war, p. 64.
- French King.* Prerogatives of, p. 202.
- French Language.* Why used in the ancient Statutes, p. 59, et seq. When disused, p. 258: 292, [p]. 426.
- French Parliament.* Anciently constituted as ours, p. 31.
- Fuero Jusgo.* Its antiquity, p. 8, [r].
- Furs.* The finery of the ancient dress, p. 243, [q].
- Fuz.* A Celtick word, and signification of, p. 151, [u].
- G.
- Gallican Church.* Privileges of, p. 6.
- Gallies.* A punishment formerly by our Law, p. 93.
- Game Laws.* Peculiar to the Northern parts of Europe, p. 454, et seq.
- Gaming.* Laws against in England, p. 421.
- Garrenne.* Signification of, p. 48, [d].
- Gates of Cities.* Formerly the courts of justice, p. 187, [c].
- Gentil-homme.* Ancient signification of, p. 288.
- Geography.* Of the Legislature, formerly not very accurate, p. 435.
- By God and my Country.* What was the original meaning of these words, used by a criminal, p. 84, [i].
- Goths.* English Laws derived from them, p. 9.
- Greek Language.* How probably pronounced, p. 251.
- Guardians.* Jealousy of, by some laws, p. 45.
- Gubbins.* A lawless people, so called, p. 124, [g].
- H.
- Hailes, Lord.* His observation with regard to the Game Laws of Scotland, p. 455, [i].
- Hawks.* Severe law in Egypt against destroying them, p. 457.
- Henry III.*
- Henry IV.* } Their characters as
- Henry V.* } *Legislators*, at the
- Henry VI.* } end of the Statutes
- Henry VII.* } of each reign.
- Henry VIII.* }
- Heresy.* Signification of, p. 352, [z]. How anciently punished, p. 353, et seq.
- Herring Fishery.* Statute with regard to, p. 284.
- Highways.* Stiernhook's distinction between, p. 16, [q].
- Hokette.* Supposed signification of, p. 216.
- Homage.* Manner of paying it, p. 206.
- Horses.* Why breed of large horses encouraged by Stat. 27 Hen. VIII, p. 498, et seq. Act for punishing the stealers of, p. 523.
- Hue and Cry.* Meaning of the term, p. 149. Used in France, p. 150.

I.

- James I.* His character, as a *Legislator*, at the end of the Statutes of his reign.
- Japanese.* Differ from all other nations, in their laws and customs, p. 26.
- Iceland.* Trade with, p. 242. 400, [d].
- Jews.* Ancient persecution of, p. 222, et seq.
- Ignorance of the Law.* Hardship of this presumption in some instances, though necessary, p. 134.
- Illuminators.* Encouraged, p. 432, [k].
- Improvement.* Under the Statute of Merton, p. 48.
- Indictment.* Ancient form of, should not be changed, p. 412.
- Infangthef.* Signification of, p. 350, [x].
- Insidiatores viarum.* Signification of, p. 357.
- Intefiri.* Signification of, p. 13.
- Ireland.* How far Henry II's conquest extended, p. 160, et seq. Bound by English Statutes, p. 165.
- Irish.* A severe law against, p. 388.
- Judges.* Formerly corrupt, p. 23. Formerly differed much in their opinions, p. 224. Not to act as such in their own counties, p. 324. This equally prohibited by the law of China, *ibid.*
- *Bæotian*, corrupt in the time of Hesiod, p. 23, [l].
- Jury.* How long used in England, p. 19, et seq. Controlled formerly in their verdict by the judge, p. 100, [s]. The reason why they are not permitted to eat

and drink, p. 516, [u]. Perjury objected to those of London particularly, p. 458.

Justice. Ancient administration of, corrupt, p. 23.

K.

- Kidellus.* Signification of, p. 15.
- King de facto, et de jure,* p. 451.
- Kings.* May be too rich, p. 236.
- Anciently judges, p. 429, [f].
- Kings of England.* Style of, p. 167.
- King's Evil.* Supposed miraculous cures accounted for, p. 107, [e].
- Knighthood.* The compulsion to take this order anciently, p. 192.
- Knights.* Compulsion to take the order of, p. 192. In the sea, as well as land service, anciently, p. 333, [i].
- Kymortha.* Signification of, p. 360.

L.

- Labourers.* Pay of, by 23 Edw. III, p. 264.
- Larceny.* The different Statutes with regard to, considered, p. 477, et seq. Whether it is Larceny for a servant to steal his master's plate, p. 479. Punished by loss of the hand in the time of Edw. I, p. 489, [x].
- Larceny (from the House).* Statutes with regard to, p. 482, et seq. Ancient punishment of, p. 489, [x].
- Latin.* Occasion of many Statutes being in that language, p. 65. More pure in the writings of monkish Authors than commonly apprehended, p. 73. Pleadings in, when first introduced, p. 290.

Law

- Law of Nations.* Instance of a summary proceeding with regard to, p. 400, [c].
- Law-Suits.* Decrease of, p. 509, [e].
- Leprosy.* Formerly in England, p. 218.
- Libel.* The case *de famosis libellis* considered, p. 94, et seq. Statute *de Scandalis Magnatum*, p. 314.
- Library.* Of the French king, purchased by the Duke of Bedford, whilst regent of France, p. 513, *.
- Lingua Wallensium.* Signification of, p. 258, [t].
- Livery.* Statute against, p. 344.
- Livy.* Poet and Orator to the Duke of Gloucester, p. 349, [t].
- Lollard.* Etymology of, p. 384. Statutes against, *ibid.*
- London.* Its great importance, p. 153, [z].
- London Juries.* Formerly considered as partial, p. 459.
- Luckup.* Case of, p. 247, [t].
- Luxury.* Occasionally greater in former centuries than at present, p. 240.
- Lycurgus.* A paradoxical legislator, p. 492.
- M.**
- Magna Charta.* Not commended by the ancient Writers, p. 1. Was not intended to renew the Saxon laws, p. 3. The French *Magna Charta* as styled by Boulainvilliers, p. 31. Copies of, anciently deposited in every cathedral, p. 174, [b].
- Mainer.* Signification of, p. 350.
- Maintenance,* p. 185.
- Maletolt.* Oppressive tax of, p. 174.
- Manslaughter.* The Saxon word *feobt* should be used instead of it, p. 70, [b].
- Manumission of a villein,* by Henry VIII, p. 305. Roman form of, p. 322, [s].
- Marches.* The people of, generally lawless, p. 316. Laws relating to them, *ibid.*
- Marga.* Term of Pliny's, to signify Marl, p. 39, [m].
- Marl Pit.* Right of sinking, p. 39.
- Martin Sir Henry.* Many of his decrees reversed, p. 325, [w].
- Mary. Queen.* Considered as a Legislatrix, at the end of the observations on the Statutes of her reign.
- Market, Clerk of.* His extortions, p. 453.
- Marshalsey, Court of.* Statute against extending its jurisdiction, p. 402.
- Mead.* Much used in the Northern parts of Europe, p. 42.
- Mehun.* Jean de, his legacy to a monastery, p. 30, [e].
- Merchant.* Edward IV, at the latter end of his reign, p. 427.
- Millers and Bakers.* Severe laws against in most countries, p. 53.
- Mills.* A considerable head of most laws, p. 212.
- Minor Kings.* Why seldom great or able men, p. 74, [n]. Whether the Predecessor may appoint the guardian of, p. 297, et seq. No settled age for his Majority by the law of England till 25 Hen. VIII, chap. xxii. p. 298.
- Minstrel.* Signification of, p. 336.

Monasteries

- Monasteries.* Their dissolution one occasion of the decrease of law-suits, p. 508.
- Money.* Comparative value of, p. 110, [k]. 267. Absurdity of the laws against the exportation of, p. 319.
- Money bill.* Hardwick Papers, vol. ii. Pecuniary penalties of late deemed by the commons to make money bills. Letter of Lord Somers 1698, p. 434.
- Monks.* Not ignorant of classical learning, p. 73.
- Morfar Rhydland.* Ancient Welsh Song of, p. 361.
- Morgengavium.* Signification of this term, p. 9, [s].
- Mortmain.* Inconvenience of, p. 29. Consequences, of, p. 113.
- Du Moulin.* Considered as the French Papinian, p. 12.
- Mountaineers.* Have not an early system of laws, p. 365, [b].
- Murder.* Punishment for this crime anciently, p. 461, et seq. By the laws of Wales and Norway, p. 489, [x].
- Murdrum.* Signification of, p. 70, [b].
- Musie.* When the Italian style first introduced, p. 545, [z].
- Mute.* Punishment for standing mute, considered, p. 82, et seq.
- N.
- Navigation,* act of. What is said to have occasioned it, p. 282. First Regulations by 5th of Richard II, which may be deemed so, p. 320.
- Navy of England.* Bad state of in the time of Edward III, p. 320, [n].
- Nef-Chevalier.* Right of, p. 146.
- Negotiators.* English commonly supposed to be unable, p. 258.
- Negro.* Whether by becoming a Christian he is free, p. 312.
- Nemda.* Signification of, p. 19, [z].
- Nicole.* Antient name for Lincoln, p. 66, [c].
- Nief.* Statute with regard to, p. 238.
- Non Obstante.* Kings of England seem formerly to have had this power, p. 182.
- Norfolk.* A litigious county, p. 21, [f].
- Normans.* Very litigious, p. 51, [l].
- Nos.* Why used by Kings, p. 30, [b].
- Notice de Diplomes.* A late learned publication, p. 237, [i].
- O.
- Oath.* Ancient form of, p. 177. When altered, *ibid.* [b].
- Oath of a Judge.* Settled by the 18th of Edw. III, p. 263.
- Obsolete.* Whether a Statute can become so, p. 45.
- Occasio.* Signification of, p. 38, [k].
- Open Court.* What was anciently understood by this term, p. 144.
- Opposition.* Supposed first instance of, to the Crown, in the House of Commons, by an individual, p. 470.
- Ordeal.* Trial by, when disused, p. 330.
- Owen Tudor.* See Stowe's Chron. p. 377.
- Oxford University.* Statutes with regard to, p. 376. 388.
- P.
- Pardon.* Power of, anciently abused by the King, p. 27. 231. Promise of, to a Witness, whether an objection to his testimony, p. 181.
- Parliament.* Signification of, p. 77. How constituted anciently, p. 79, [u].

- Parliamentum Indoctum*, p. 373. Supposed occasion of the lawyers being excluded from, p. 373. Their dependance anciently upon great men, p. 374.
- Partus ventrem sequitur*. Not a rule of the old French laws, p. 306, [b].
- Pasnage*. A head of the ancient law, p. 36.
- Pauper Act*. Proposed amendment of, p. 468. [o].
- Peerefs*. How to be tried, by an explanatory act of Hen. VI, p. 408.
- Peers*. Had not formerly a fair trial, p. 32. How tried for a misdemeanour, p. 255, [o]. Whether the trial by, extends to misdemeanour, p. 409.
- Peine fort et dure*, p. 82, et seq.
- Pele*. Signification of, p. 417, [b].
- Perjury*. No ancient Statute against, p. 176. Particularly complained of in London Juries, p. 459.
- Perrers, Alice*. Her extraordinary ascendancy over Edw. III, p. 294, [x].
- Peruvians*. Had poor laws, p. 538, [o].
- Physicians*. Statute with regard to, as also Laws in other countries, p. 471, et seq.
- Piepowder, Court of*. Signification of the word, p. 423.
- Pigeons*. A head of the French law, p. 208, [n].
- Pillory*. Signification of, p. 55, [a]. The mode of punishment improper, p. 56. Form of, p. 211.
- Pin-money*. Why so called, p. 205.
- Piracy*. Anciently not dishonourable, p. 366.
- Plague*. Consequences of, with regard to the manners of the people, p. 264.
- Plantations*. The English bound by British act of parliament, p. 166.
- Pliny the Younger*. Speaks seven hours before the Roman Senate, p. 68, [e].
- Poets*. Citations from, in the illustration of laws, apologized for, p. 367, [m].
- Poison*. Clause in Statute of Edw. VI, with regard to, p. 524, et seq.
- Poor*. 43 Eliz. with regard to, considered, p. 535, et seq.
- Pope*. Supposed advantage formerly to Christendom from his assumed powers, p. 510.
- Preamble to a Statute*. Hath often improper recitals, p. 394. 477. Sometimes false, p. 411.
- Precedency*. Mistakes of Selden, with regard to the Statute of Henry VIII, p. 306.
- Premunire*. Signification of the word, p. 279.
- Prerogatives of the King*. Of the French King, p. 202.
- Pressing Mariners*. Legality of this practice considered, p. 334, et seq.
- Privileges of Corporations*. Often very inconvenient to themselves, p. 334, [l].
- *of the House of Lords*. Insisted upon, in a bill to punish wood-stealers, p. 491, [a].
- *of Parliament*. First mention of in the Statute-book, p. 372.
- Proclamations*. A judicious collection of them should be made, p. 220. Of Henry VIII, and his Successors, with regard to the game, p. 456.
- Profrus*.

- Profrus.* Signification of, p. 226.
Prolixity, in the English conveyances, p. 197.
Pronunciation, of some of the vowels by the ancient Romans, p. 485, [p]. *Their guttural pronunciation*, p. 486.
Protections. Mistake of Sir Edward Coke, with regard to, p. 201.
Provisor. Signification of, p. 276. Statute against, *ibid.*
Punctuation. When the marks of were first used, p. 438, [x].
Punishment. Instances of severe ones, p. 273, [b]. 274, [e]. 396, [w].
Purveyance. Oppression of, p. 183. 289. For the king's horses and dogs, p. 237, [i].
- Q.
- Queen Dowager.* Statute of Henry VI, with relation to, p. 397.
Queen of England. Her rights, p. 205. How intituled in Statute of Edward III, and by the Saxons, p. 272, [w].
Quo Warranto. Unconstitutional Statute of, and its consequences, p. 109.
- R.
- Ragman.* Signification and supposed etymology of, p. 215, [u].
Ransom of a Prisoner. One of the ancient ways of becoming rich, p. 389, et seq.
Rape. Laws with regard to, p. 139, et seq.
Rastal. Variations in the spelling of his name by himself, p. 245.
Receivers of stolen Goods. Considered as thieves by Phocylides, p. 488.
- [t]. Law of the Ægyptians with regard to, *ibid.*
Records. Alteration of, and peculiarity of the law of England with regard to, p. 246, et seq.
Recovery. Absurd fiction of, p. 132. When first introduced, p. 448.
Regiam Majestatem. Whether a transcript from *Glanvil*, p. 18.
Regrator. Signification of, p. 213, [n].
Residence. Whether necessary in Electors by Statute of Henry V, p. 380.
Retaliation. Singular doubt of the Sybarites on a law of this sort, p. 466, [l].
Retrospective Law. Instances of, p. 525, [n].
Reward. For the apprehension of criminals, sometimes too great, p. 181, [o].
- Richard II.* { Considered as Legi-
Richard III. { slators, at the end of
the observations on
the Statutes of their
respective reigns.
- Rolles Gascones.* Published by *Carte* for the use of the French, p. 109, [b].
Romant de la Rose. By whom written, p. 30, [e]. Varies in its transcripts, p. 245.
Royal Fish. Which are so considered, p. 401.
- S.
- Salaries of the Judges.* Increased by Edward III, p. 263, [c].
Sallette. Signification of, p. 342.
Salmon. Provisions for the preservation of, p. 146, et seq.

- Sande-Mænd.* Jury in the Danish Law, so called, p. 18.
- Scotch Law.* Agrees with the English. See Preface, and p. 17. 126.
- Scotch Statute.* The method of passing it, p. 28, [c].
- Scutagium.* Signification of, p. 342.
- Seigneur.* Signification of the word, p. 286. 299.
- Selden.* Supposed mistake of, by Bishop Burnet, p. 506.
- Self-defence.* Encouraged by the Law of Spain, p. 71, [i].
- Sentence.* Form of in capital cases cannot be varied, p. 86r.
- Sewers.* Signification of, p. 396. First law with regard to, *ibid.*
- Sheriff.* Abuses in the office of, p. 14. 58. 71. 185. 457.
- Skipwreck.* Laws with regard to, p. 25.
- Shute Robert.* Particularity of his patent, p. 137, [f].
- Sicilians.* Proverbial saying with regard to, p. 25, [s].
- Sine-cures.* Abuse of, when first introduced, p. 349.
- Slavery.* Whether inconsistent with the English Law, p. 312, [s].
- Smuggled Goods.* The receiver of should be punished, p. 418, [i].
- Somerset, Duke of.* Illegality of his indictment, p. 460, [y].
- Spartan Customs.* No accurate account of, p. 490.
- Speculum Regale.* A book of the ancient Law of Iceland, p. 1, [b].
- Spelling.* No accuracy in, anciently, p. 245.
- Spiegel.* A book of the ancient German Law, p. 1, [b].
- Stabbing Act.* First of James I, considered, p. 543.
- Star Chamber.* First institution of that court, p. 438.
- Statutes.* The modern more clear than the ancient, though more prolix, p. 196. Form of passing, p. 2.
- Steward High.* Need not be a Lord of parliament, p. 287.
- Strangers.* Laws with regard to, p. 26.
- Stultiloquium.* Who paid the fine for, p. 67.
- Style.* Hath not occasioned any law suits, p. 197.
- Styles.* Of the kings of England, p. 167.
- Subtleties in the Law.* Began to prevail in the reign of Edward III, p. 229.
- Sumptuary Law.* Against excess in entertainment, p. 240. With regard to dress, p. 242.
- Supposititious Children.* Writ to prevent this imposition, p. 10.
- Surgeon.* Statute with regard to, as also a vulgar error, accounted for, p. 474.
- Surnames.* Not usual in Wales, amongst the lower people, p. 288, [b]. Formerly often changed, p. 372, [y].
- Swine.* A head of the ancient English Law, p. 37.

T.

- Taper.* Signification of this French word, p. 150, [s].
- Tarring and feathering,* punishment of p. 489, [x].
- Teague.* Signification of this term, p. 302, [i].
- Tel cuide ferir, qui tue.* Supposed meaning of this maxim of the French law, p. 527, [s].

Templars

Templars Knights. The other abolished, and supposed occasion of this, p. 138.

Testamentum. Ancient Signification of this word, p. 502, [i].

Theft. Whether encouraged by the Laws of *Lycurgus*, p. 491.

Title of a Statute. Often misleads, or is otherwise improper, p. 449.

Title of the king of England to the crown of France, p. 232, [i].

Henry the Eighth relinquishes it, *ibid.* Supposed title of the king of France to the crown of England, p. 511, [g].

Tobacco. Statute to prevent the planting of has been thoroughly carried into execution, p. 423, [r].

Tommens in Wales. What may have occasioned them, p. 426, [z].

Torture. Abolished in France, p. 33. Formerly practised in England, p. 88, et seq. 495, et seq.

Tourne. Signification of, p. 69, [g].

Transportation. Considerations with regard to this punishment, p. 445, et seq.

Treason. The Statute with relation to considered, p. 270, et seq.

Trebuchetum. Signification of p. 54, [y].

Tronage. Right of, p. 136, [e].

Trusts and Uses, when first introduced, p. 500. Inconveniences of, p. 501, et seq.

Turnaments. Proclamations against, p. 220.

U.

Vadlet. The king's eldest son formerly so called, p. 344, [f].

Valiant. Ancient Signification of this word, p. 260.

Value of money, at different periods, p. 267.

De Ventre inspiciendo. Writ of, p. 10.

Vidimus et Vidimè. The French use of these terms, p. 5, [b].

Villeins. Ancient state of, and why the tenure is not now heard of, p. 299, et seq.

Vineyards. Not formerly planted in England, p. 233, et seq.

Viol. Signification of, p. 139.

Virtuosus. Signification of this term, p. 414, [b].

Viscount. Mistake of the heralds with regard to the time of the first creation of this rank of nobility, p. 410.

Vivarium. Signification of, p. 47, [d].

Voltaire. Supported in his History of Charles XII, by Fabricius's Letters, p. 293.

Uses and Trusts. What occasioned them, p. 403, 500, et seq.

Usury. Discouraged by the ancient laws, and why, p. 49.

Vulgar errors. With regard to what is supposed to be law, enumerated, and some of them accounted for, p. 474, [z].

W.

Wales. Whether conquered by Edward I, p. 12.

Wanagium. Signification of, p. 12.

Wardrobe. Treaties and Acts of State formerly deposited in, p. 255, [p].

Waste. Ancient laws with regard to it, p. 133.

Weights and Measures. Ineffectual endeavours of the legislature to introduce uniformity, p. 17.

Welsh.

- Welsh.* Whether severe laws against, p. 358, et seq. The Statute of their union with England considered, p. 514.
- Welsh Castles.* Their style of architecture whence borrowed, p. 104, [y]. Most of the considerable ones built by Edward the First, p. 120, [b].
- Wergild.* This punishment for murder considered, p. 461, et seq. Etymology of the word, p. 466, [l].
- Whales.* Tail of, anciently belonged to the queen, p. 204. Considered as one of the royal fish, p. 408, [e].
- Widow.* Her quarentain, p. 8.
- Wills.* The construction of them considered, p. 502, et seq.
- Wines of Gascony.* Offences with relation to, p. 280.
- Witchcraft.* Passage from Selden, with regard to these prosecutions, censured, p. 407, [r].
- Witnesses.* Exceptions to, by the Civil Law, and the ancient Laws of France, p. 493, [c].
- Witnesses to a Deed.* Anciently a necessary part of the Jury, p. 198, [t].
- Woman.* Whether included under the word *man* in a law, p. 243.
- Writs ancient.* Arguments from, p. 126.
- Y.
- Year and Day.* The King's holding lands for, p. 15. How soon death should follow after a stroke or stab, so as to make the offence murder, p. 527.
- Yew Trees.* Planted in church-yards to screen churches from the wind, p. 191. perhaps also for the use of Archers, p. 424, [w].



F I N I S.

